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REPORT OF THE COMMITTEE ON LEGISLATION.

To the Members of the Massachusetts Bar Association:

The list of acts of 1924 of interest to the bar is appended to this report.

The Judicial Council.

The most important act of the legislative session relating to the courts was chapter creating an advisory Judicial Council, following the recommendation of the Judicature Commission and the Attorney General. This council, for the continuous study of the judicial system and its results, has now been appointed.

Arbitration.

During the year your committee considered the bill to amend the arbitration law and provide for agreements to arbitrate future disputes, which was drawn by Messrs. Charles P. Curtis, Jr., Richard C. Curtis, and John C. Jones, Jr., of the Boston bar. The draft of this act as presented to the legislature was printed in the January number of the Quarterly, pp. 54-55.

The views of your committee were gathered by correspondence. While several of them expressed skepticism arising from their own experience with arbitration, most of them were in favor of trying the experiment of such an act which could be used by those persons who wished to make such arbitration agreements. This was reported to the members of the Executive Committee who were more divided in opinion. The substance of the varying views of members of the different committees was reported to the Legislative Committee.

At the final hearing on the bill in addition to the provisions which were printed in the January Quarterly above referred to, a new section was offered as follows:

> Section 19A—Upon application by a party at any time before the award becomes final under Section 19, the Superior Court may in its discretion instruct the arbitrator or arbitrators upon a question of law.

Section 21 as printed in the Quarterly was also changed by striking out the words "under the contract" and substituting therefor the words "if covered by the arbitration agreement".

The legislative Committee on Legal Affairs, however, reported unfavorably on the whole proposal, partly because the subject was still under consideration by the National Conference of Commissioners on Uniform State Laws.

District Court Judges in the Superior Court.

The act of 1923 allowing the Chief Justice of the Superior Court to call in district court judges from time to time to sit with juries in the Superior Court in a limited class of cases has proved so effective in breaking the congestion of criminal dockets that the legislature has by chapter extended the class of such cases to include all "misdemeanors except conspiracy and libel".

In the *Boston Bar Bulletin* for July, 1924, the following paragraph appeared which we call to the attention of the bar throughout the state.

> "An act was passed extending the jurisdiction to include all misdemeanors, except libel and conspiracy, and providing compensation for the judges dating back to January first. This means that the judges who sat between October and January have served without compensation and must accept the situation philosophically as the pressure of the economy argument was too strong. It is only fair, however, that they should have the satisfaction of knowing that they performed a great public service which is appreciated even though they were not paid. They helped to break the back of the worst monster in the judicial system,—the deliberate congestion of criminal cases in the Superior Court. It is a most successful experiment recommended by the Judicature Commission. Even including the back pay, for considerably less than the cost of one permanent Superior Court judge, the Commonwealth has had the services of about fifteen judges when and where needed for the business of the minor criminal offences. More cases have been tried. Still more have produced pleas of 'guilty' when trial was found to be imminent, and still more have not been appealed, so that in Suffolk County alone the number of appealed cases is reported to have dropped from five hundred or more to about three hundred or less a month."

Declaratory Judgments.

For several years your committee has supported the recommendation of the Judicature Commission for procedure for declaratory judgments. In 1923, a sub-committee of the Executive Committee made a report, which was printed in the Quarterly for February, 1923, pp. 61-64, favoring the idea, but recommending

that it be limited at first to cases in which both parties consent to this form of submitting questions. This report was approved by a majority of the Executive Committee.

We again recommend legislation in accordance with the draft as thus limited and approved and respectfully call the matter to the attention of the legislature for further consideration.

Appraisers.

We again recommend, as in previous years, the proposal of the Judicature Commission to avoid the expense of appraisers in the Probate Court unless the court orders them. This recommendation was approved by members of the association at the annual meeting in 1922.

Respectfully submitted,

Fred T. Field, *Chairman.*
Fitz-Henry Smith,
John E. Hannigan,
Edwin G. Norman,
Joseph Michelman,
Arthur F. Bickford,
F. W. Grinnell,
Charles P. Curtis, Jr.,
Edmund A. Whitman,
Henry M. Hutchings,
Hawley K. Rising,
Wilmot R. Evans, Jr.

APPENDIX.

List of Acts of Interest to the Bar.

C. 3 relative to release of tax titles.

C. 7 relative to equity procedure in cases relating to tax titles.

C. 8 requiring approval of probate court to waiver of will by a guardian.

C. 10 providing for dissolution of attachments of real property if no service is made on defendant.

C. 11 relative to exemption from taxation of loans secured by mortgages of real estate.

C. 12 relative to collection of accounts due cities and towns.

C. 13 relative to exemption from local taxation of widows, certain unmarried women, aged persons and certain minors.

C. 18 relative to fees of special justices for taking bail in criminal cases.

C. 19 relative to disposition of persons committed for observation as to sanity.

C. 20 relative to discharge of mortgages by the Land Court.

C. 24 removing price limitation in purchase of land by cities and towns for forestation.

C. 20 repealing certain provisions as to consolidated tax returns of domestic and foreign business corporations.

C. 21 relative to tenure of holder of a certificate of title.

C. 38 relative to interest on judgments.

C. 56 relative to releasing dower, curtesy and homestead. Note cf. c. 227, as to recording affidavits. Sound practice to secure marketable title still requires the naming of the persons releasing as a grantor and a recital of the facts of marriage in the body of the deed, *i. e.*,

I, $\frac{\text{husband}}{\text{wife}}$ of said ——————————————— etc.

C. 57 extending civil jurisdiction of Boston Municipal Court to $5,000.

C. 58 relative to justices of the peace authorized to issue warrants and take bail in criminal cases.

C. 68 providing that loans by savings banks and savings departments secured by deposit books may be for the full amount of the deposit.

C. 72 extending acts protecting tenants.

C. 73 relative to stockholders meetings of business corporations.

C. 74 providing additional compensation for jurors in the case of *Willitt et al* v. *Herrick et al* in Norfolk County.

C. 108 as to costs in civil actions.

C. 111 increasing compensation and travel allowance for jurors.

C. 128 providing for uniting interests in connection with taxation of legacies and successions.

C. 129 relative to liability of innholders for loss of property.

C. 131 requiring returns of court business by clerks of courts to the state secretary.

C. 133 relative to appeals under ordinances and by-laws limiting buildings to zones or districts.

C. 134 relieving the attorney general of the burden of conducting disbarment proceedings and providing that they shall be conducted by an attorney designated by the court and expenses paid as in criminal prosecutions.

C. 147 the Uniform law as to fraudulent conveyances.

C. 149 providing that district courts may impose the same penalties as the Superior Court for all crimes within their jurisdiction, except a sentence to state prison.

C. 150 providing for simultaneous sessions of the Supreme Judicial and Superior Courts in the same county.

C. 151 exempting parties to certain negotiable instruments from trustee process.

C. 152 regulating plural sentences to state prison.

C. 164 relative to punishments for attempts at certain larcenies and felonies.

C. 165 to determine the time of taking effect of a "from and after" sentence.

C. 170 relative to certain petitions to the General Court.

C. 175 relative to suspension of execution of sentences.

C. 184 Relative to the right to search and seizure under the fish and game laws.

C. 188 providing for an executive secretary for the Chief Justice of the Superior Court.

C. 193 to provide for personal service outside the Commonwealth on libellees in divorce cases.

C. 200 establishing the Commissioners on Uniform State laws.

C. 207 relative to additional compensation under Workmens Compensation Laws in certain cases.

C. 210 for advisory vote on daylight saving. (Cf. discussion in July number of the QUARTERLY.)

C. 220 an act repealing an act providing for the taking, for educational purposes, of the picture entitled "The Synagogue", now in the Boston Public Library.

> *Whereas*, Notwithstanding that it is the sense of the general court that works of art, which by their nature and character reflect upon any race or class within our commonwealth, should not be placed in public buildings, nevertheless it is the opinion of said general court that chapter five hundred and forty-one of the acts of nineteen hundred and twenty-two does not embody a feasible or constitutional solution of the situation which said chapter sought to remedy, accordingly,
>
> *Be it enacted, etc., as follows:*
>
> Chapter five hundred and forty-one of the acts of nineteen hundred and twenty-two, as affected by chapter eighty-two of the acts of nineteen hundred and twenty-three, is hereby repealed.
>
> *Approved April 10, 1924.*

C. 227 providing that certain affidavits relative to the title to land may be recorded. Cf. 56 above mentioned.

C. 231 pertaining to certificates under the Uniform Limited Partnership Act.

C. 244 providing for the Judicial Council.

C. 271 adding a third judge to the Land Court.

C. 289 relative to the discontinuance of certain ways as public ways.

C. 299 relative to aiding discharge prisoners.

C. 300 relative to the determination of value in connection with inheritance taxes.

C. 302 relative to fraudulent or invalid signatures on I. and R. petitions.

C. 311 providing certain changes in the jury laws. (This act resulted from the report of the Special Commission on Juries reprinted in the QUARTERLY for January, 1924.)

C. 316 permitting certain aliens to take the bar examinations.

C. 321 relative to taxation of business corporations.

C. 335 amendments to Boston building laws.

C. 345 relative to rights of surviving spouse in estate of a spouse dying testate where they were living apart under a court decree.

C. 351 relative to certain exemptions under income tax law.

C. 361 repealing statute providing for a joint legislative committee on the State House.

C. 376 relative to compensation of Probate judges for service outside their own counties.

C. 395 making attorney-general a "small claims" tribunal for claims against the Commonwealth not exceeding $1,000.

C. 406 making corrections and amendments in the insurance laws.

C. 413 relative to discharging water liens.

C. 427 containing the registration of motor vehicles and trailers for a certain period after death of owner.

C. 462 relative to the contents of the "Blue Book", so called.

C. 485 extending the jurisdiction of district court judges called to sit with juries in the Superior Court under c. 469 of 1923 to include "any misdemeanor except conspiracy or libel"; and providing compensation for the judges thus sitting.

C. 509 for an advisory vote as to ratification of the so-called "child labor" amendment. This act was printed in full in the QUARTERLY for July, 1924, p. 21.

RESOLVES.

C. 43 for a special commission on effective means of reducing the annual property loss from fires.

THE JUDICIAL COUNCIL APPOINTED UNDER CHAPTER 244 OF THE ACTS OF 1924 FOR THE CONTINUOUS STUDY OF THE JUDICIAL SYSTEM.

Ex Officio:

The Chief Justice or some other representative of the Supreme Judicial Court.

The Chief Justice or some other representative of the Superior Court.

The Judge or some other representative of the Land Court.

Appointed by the Governor:

From the Probate Bench—Hon. WILLIAM M. PREST of the Suffolk Probate Court.

From the District Bench—Hon. FRANK A. MILLIKEN of New Bedford, (chairman of Administrative Committee of the District Courts).

From the Bar—

ADDISON L. GREEN,
ROBERT G. DODGE,
FRANK W. GRINNELL,
FREDERICK W. MANSFIELD.

THE PREVAILING IGNORANCE OF THE CONSTITUTION.

(Extract from an article by Charles Willis Thompson in the New York Times on the Constitution.)

In the magazine section of the New York Times, of June 29, 1924, appeared an article entitled, "That Dark Secret—The Constitution." The following extract and illustration deserves the attention of the bar:

"Not long ago Attorney General Stone said in a public address that he had received hundreds of letters asking him why he did not prosecute Dr. Nicholas Murray Butler for treason.

"In an article written by a clever Jesuit for a little monthly published by the Church of Our Lady of Mercy appears the statement that the question whether a Catholic can be constitutionally elected President of the United States "is asked in every city from New York to San Francisco at election time." This is a staggering statement, but after spending thirty years in traveling through all the principal cities of the United States I am convinced that the Rev. Paul L. Blakely, S. J., understated the case. I think full half of the population, Protestant and Catholic, alike, imagine that there is some such clause in the Constitution. In saying this I do not mean only moron or half-educated people, but college graduates as well—men who forget after commencement everything they are not specially interested in. It is as easy for a college graduate to forget the Constitution as it is for him to forget the First Book of Caesar.

"There are many college graduates who think the people elect the President by direct vote and have forgotten all about the Electoral College. I have met them.

"The majority of college graduates, I am pretty sure, do not know what the Bill of Rights is.

"Lawyers are not exempt. They are supposed to know all about the Constitution, but it is easy to stump an average good lawyer with a prosperous practice by asking him a simple question about it unless his line of practice is such as to make him keep in constant touch with it. He has studied it, of course, but in the course of years he has retained only those parts of it which he uses in his daily business.

"Most people believe that the Constitution provides for every emergency that might arise except woman suffrage and prohibition.

"What is to be done about it? You can lead a horse to water but you can't make him drink. To most people the Constitution is a sacred relic in a glass case, not to be taken out or looked at. It might as well be a goldfish. A group of newspapers in different parts of the country recently combined under the lead of The Los Angeles Times to popularize the Constitution by getting the school children all over the Union to compete in prize essays or orations. There was nothing in it for these newspapers; it is purely a patriotic move, and, as far as it went, it was a success. Hundreds of thousands of school children learned more about the Constitution than their Principals with the Faculty thrown in."

Note.

These words recall the statement made by Hon. Charles E. Hughes some years ago, at the 25th anniversary of the founding of the Harvard Law Review, that one of the great functions of the American Bar was to "explain to the people their own institutions." The energetic movement carried on by President Saner and his committee of the American Bar Association, in this direction shows that the bar is waking up to its responsibilities in the matter. But, as Mr. Thompson points out, the bar needs to re-educate itself as to the contents, history and meaning of Federal and State Constitutions in order to perform this function more effectively.

F. W. G.

UNITING INTERESTS FOR INHERITANCE TAXATION IN MASSACHUSETTS—DISCUSSION OF CHAPTER 128 OF THE ACTS OF 1924.

G. L., c. 65, s. 1 provides:

> "All property etc. . . . which shall pass by will, or by laws regulating intestate succession, or by deed, grant, or gift, except in cases of a *bona fide* purchase for full consideration in money or moneys worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership . . . shall be subject to a tax."

C. 128 of the acts of 1924 amends G. L., c. 65, s. 1 as amended by c. 347 and s. 1 of c. 403 of the acts of 1922 by adding at the end the following new paragraph:

"THEY DON'T KNOW WHAT IS IN IT."
(Reproduced by permission of the New York Times.)

> "All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder."

In so far as this act is intended to unite legacies and transfers *inter vivos* "in contemplation of death", it not only suggests the question of constitutionality of the tax on such transfers *inter vivos* (which was discussed in the May number of this magazine for 1921 pages 116-122), but the question arises whether the act applies at all to such transfers.

By that portion of the act of 1920, which now appears as s. 3 of G. L., c. 65, a taxable transfer "in contemplation of death" is defined as one occurring within two years of the death of the grantor or donor. This language differentiates this particular kind of transfer from the other transfers described in s. 1. It is specifically defined by §3 as a transfer *"inter vivos"*. Accordingly, it does not seem to fall within the words of c. 128 of 1924 as passing *"from a decedent"* or accruing "in the manner hereinbefore provided to such beneficiary *on account of the death of such decedent."* A transfer *inter vivos* by which complete title passes does not "pass from a *decedent"* and does not "acrue . . . on account of the death of such decedent". The title being complete before the death of the transferror, is not affected in any way by the fact of death when it occurs.

The new statute above quoted came after the two cases of *Marble* v. *Treasurer and Receiver General 245 Mass. 504* and *Pratt* v. *Dean 246 Mass. 300.* In both of these cases, in which the court held that the particular interests of the beneficiary in those cases could be united for taxation purposes, the court pointed out that the complete interest in the property did not pass *until the fact of death occurred.* In *Pratt* v. *Dean,* the court said:

> "The tax is imposed not upon the property but upon the right to receive property by reason of the death of the testator or donor. It is not a property tax but *an excise upon the transmission of property.* The interests of the wife and daughter under the two declarations of trust passed to them *upon the death* of Charles A. Dean. By express words their interests under his will also passed on his death, because the will speaks from his death. *Lyford* v. *McFetridge,* 228 Mass. 285, 289. *Green* v. *Kelley,* 228

Mass. 602, 606. Therefore all their property passed at the same time and by reason of the same event, namely, the death of Charles A. Dean. . . .

"The decisive factors established by the statute are the event by the happening of which the property passes and the time of the passing of the property. These are the same in the case at bar. . . .

"The dominant purpose manifested by the statute is that the aggregate of property or property interests passing to another from one benefactor *on his death,* whether by will or other donative instrument, shall be treated as a single subject of the excise tax. If this were not so, the purpose of a graduated tax, increasing with the value of the property or interest passing, and with exemptions, could be entirely frustrated by the simple device of splitting a large estate into small parts by trusts and deeds and other instruments of gift, each passing property or property interests not in excess of the exemption. Statutes designed to secure revenue for the support of government ought not to be so interpreted as to be susceptible of being rendered thus ineffectual unless required by plain words.

"This conclusion is reached by interpretation of the tax statute and with full realization of the general principle that tax laws are to be strictly construed, that the right to tax is not to be extended by implication, and that doubts are to be resolved in favor of the taxpayer. *Eaton, Crane & Pike Co.* v. *Commonwealth,* 237 Mass. 523, 530, and cases there collected.

"If the property interest vested in enjoyment or possession *independently of the death* of the donor or testator, or came from other sources, then this principle is not applicable. Hence the case at bar is distinguishable from *Dexter* v. *Treasurer & Receiver General,* 243 Mass. 523; *Tyler* v. *Treasurer & Receiver General,* 226 Mass. 306; *Matter of Hodges,* 215 N. Y. 446, *and Attorney General* v. *Barney,* 211 Mass. 134."

These passages show that the court has not in any way recognized the validity of the tax imposed on transfers "in contemplation of death" by c. 548 of the acts of 1920 now appearing in sections 1 and 3 of G. L., c. 65. Furthermore, the court points out that transfer by the fact of death as an accomplished fact, and not in any anticipatory sense, is the test to be applied on the question of uniting interests for the purpose of taxation.

Whether the statute changes this test laid down by the court in this connection may be open to question as already suggested, especially in view of the doubtful validity of the tax on such

transfers and the renewed recognition in the language quoted from *Pratt* v. *Dean* of the "full realization" by the court "of the general principle that tax laws are to be strictly construed, that the right to tax is not to be ascertained by implication, and that doubts are to be resolved in favor of the tax payer."

F. W. G.

TAX ON GIFT TRANSFERS.

A Letter by CHARLES WARREN in the New York Times.

(Reprinted from Boston Herald of June 14, 1924.)

Though other portions of the tax bill have been much discussed, no attention whatever appears to have been paid, in Congress or in the newspapers, to the question of the constitutionality of those sections attempting to impose a tax on "transfers by gift."

It is interesting to note, however, that President Coolidge, in his statement accompanying his signature of the tax bill, refers to the tax on gifts as "both unusual in nature and of doubtful legality."

Doubt as to its legality is well founded and may be based on two grounds:

1. The tax is so arbitrary as to be wanting in due process, under the fifth amendment to the constitution.

2. The tax is a direct tax and, under the constitution, can only be imposed by apportionment upon the states.

First, the proposed tax on gifts is so arbitrary, or wanting in basis for classification, in its exemptions as to become obnoxious to the fifth amendment to the constitution, as to due process. How can a tax be justified which allows a man owning $50,000 to give away his entire estate without being subject to tax, while a man owning $100,000 may give only one-half of his estate without a tax? Or how can a tax be justified which requires that when four men owning, respectively, $50,000, $100,000, $200,000 and $400,000 wish to give away their entire estates, the first one may give it all away in one year without a tax, while the others must take, respectively, two, four and eight years to give away their respective properties if they wish to avoid a tax? What basis for classification, otherwise than purely arbitrary, is there for relieving from tax during his lifetime the penurious and selfish man, while taxing heavily the generous and the philanthropic? Why relieve from tax gifts to charitable corporations while imposing a heavy tax on gifts of charity to individuals?

Such an arbitrary provision renders the validity of the gift tax more than doubtful.

Second, a tax on gifts is, of course, not an income tax and does not, therefore, come within the purview of the sixteenth amendment, which, while not granting to Congress any additional power of taxation, relieves Congress from apportioning on the states any income tax which, as a direct tax, must otherwise have been so apportioned. But if not an income tax, a tax on gifts must fall either within the class of a direct tax, in which case the constitution requires it to be apportioned on the states, or it must be an excise tax, customs or duty, in which case it need not be so apportioned.

A direct tax has been defined by the supreme court as a tax which is imposed merely because of ownership, or which falls on a man simply by virtue of the ownership of property, whereas, an excise is a tax on the exercise of a privilege, etc., such as the possession, sale or consumption of some particular article, or transmission by will or inheritance, or the exercise of corporate or other state-granted privilege.

Sale of property, by which one acquires an equivalent, may be the exercise of a privilege, and hence subject to an indirect tax or excise. But giving away one's property in one's lifetime and not in contemplation of death is not the exercise of a privilege any more than living upon or using up one's property by enjoyment of it, or than losing it by use, loss or destruction. Certainly no one would contend that a tax upon loss, depreciation or destruction of property would not be a direct tax on ownership.

It would appear that giving away one's property is inherent in ownership itself. As Alexander Hamilton said (Works, II., 34): "What in fact is property but a fiction, without the beneficial use of it?" As Chief Justice Fuller said in the income tax case in 1895, a "fundamental requisition" of the constitution cannot be "refined away by forced distinctions between that which gives value to the property and the property itself." The giving away of property is simply an exercise of inherent rights of ownership. If anything is a natural incident of the conception of private property, as protected by our laws, it would seem to be the right to make a complete gift of one's property while one is alive and not in contemplation of death.

It would seem, therefore, that a tax upon gifts is a direct tax on ownership, and must, under the constitution, be apportioned; and that it is not an excise as that term has been construed and defined by the court.

Reply to Mr. Warren.

From a Letter by I. L. Requa in the New York Times.

Charles Warren, in a letter in the Times, calls attention to the gift tax in the revenue act of 1924. He quotes President Coolidge as saying that the tax on the transfer of gifts is "both unusual in nature and of doubtful legality." Mr. Warren concurs in this view and bases his contention on the fifth amendment, the "deu process" amendment.

The portion of that amendment in issue reads "nor shall private property be taken for public use without just compensation." The courts have expressed their inability to form a general definition of "due process," and have judged each case separately upon its own facts. Any legal process which was originally founded in necessity has been consecrated by time, and approved and acquiesced in by universal consent, is ordinarily taken to be "due process."

The gift tax is on offspring of the inheritance tax, and bears a striking resemblance to its parent. It was created to fill the loopholes caused by the practice of making a gift to avoid the inheritance tax. Not all gifts of large sums are made with this purpose, but a large proportion are.

The federal estate tax is a fair one. It takes from those who can best afford it. It is painless, being taken after death.

Our government needs money to operate. It furnishs benefits and protection to those whom it taxes. The injustice of the inheritance tax lies in the multiplicity of taxation by the various states. Yet those states have a greater claim to the tax than has the federal government, for they cling to the old feudal law which said that when a man died his possessions became the property of the state. In order to induce the accumulation of wealth, it was found necessary to permit men to leave their property to those for whom they had accumulated it. The states now tax the right to transmit or receive that property. The federal government stepped in and claimed the same right. The fact that it has been approved and acquiesced in by universal consent brings it into conformity with the fifth amendment.

A great cry has arisen because many men of wealth have put their money into income-tax-free securities. Yet they have just as much right to buy whatever securities they choose as men have to give away property before their death in the hope of cutting down their respective inheritance taxes.

The gift tax is a means for checking that escape of revenue. If the federal estate tax is justified, the gift tax is justified. It is not, as Mr. Warren says, a direct tax on property, but it is a tax on the transmission of property. He asks: "How can a tax be justified which allows a man owning $50,000 to give away his entire estate without being subject to tax, while a man owning $100,000 may give only one-half his estate without a tax?" An answer to that may be put in the form of another question: "How can a tax be justified which allows a man to leave $50,000 at his death without paying a tax, while a man leaving $100,000 will have to pay a tax?" Why distinguish between an income of $2490 and one of $2510?

If, as Mr. Warren says, "a direct tax has been defined by the Supreme Court as a tax which is imposed merely because of ownership, or which falls on a man simply by virtue of the ownership of property, whereas an excise is a tax on the exercise of a privilege," then, by his own argument, the gift tax is not a direct tax, but an excise.

The federal government set an arbitrary limit of two years before death when gifts would be taxable under the federal estate tax. Why differentiate betwen a gift made one year and eleven months before death and one made two yars and one month before death? Is not one an exercise of a privilege as much as the other?

In conclusion, it would seem, therefore, that the gift tax is a just tax and an excise.

JEFFERSON'S VIEWS OF DISGUISED "DIRECT" TAXES.

In Foley's "Jeffersonian Cyclopedia" appear the following extracts from letters between 1792 and 1799, which seem to have a very practical bearing on current congressional practice. In 1792 Jefferson wrote to T. M. Randolph in regard to a proposed federal tax on pleasure horses.

"Besides its partiality it is infinitely objectionable as foisting in a *direct* tax under the name of an indirect one" (Ford Ed. VI 149) and to Dr. George Gilmer, in regard to the same proposal, "as to call this a *direct* tax would oblige them to proportionate among the states according to the census, they choose to class it among the *indirect* taxes," (Ford Ed. VI 146). In 1799 in a letter to Edmund Pendleton, he referred to "the disgusting particularities of the direct tax."

For another discussion of the "Gift" Tax see MASS. LAW QUART., *May, 1924.*

WHY AND HOW ARE LAWYERS "OFFICERS OF THE COURT?"

In canons of ethics, opinions, lectures, textbooks and after dinner speeches lawyers are called "officers of the court" and the phrase is often embroidered with much hortatory eloquence and solemn appeals to lawyers in general to behave themselves accordingly. The practical meaning of the phrase "officers of the court" however is seldom thought out and stated and one consequence of this is that it is apt to be regarded as a speech-making phrase rather than a professional title based on every day practical considerations of public necessity.

The late Josiah H. Benton was an exceedingly practical man of long and active experience at the bar. He delivered a lecture at the Albany Law School which was printed in a little volume under the title "The Lawyers Official Oath and Office" in which he gives one of the clearest detailed explanations of the phrase that has come to our attention. He begins by asking why has an oath been required for admission to the practice of law when no oath is required by law for admission to practice in any other profession, even where qualifications are prescribed or ascertained by examination as in the case of physicians? He answers that: "The significance of the lawyers oath is that it stamps the lawyer as an officer of the State with rights, powers and duties as important as those of the judges of the courts themselves." He then says:—

> "In the discharge of the duties of his office the lawyer exercises large powers and has corresponding responsibilities. He may bind his client by agreements and by conduct of which the client knows nothing, if they are within the scope of his duties as a lawyer in respect to a matter confided to him by the client. He may institute suits and cause acts to be done in them for which his client may be held responsible although entirely ignorant of them when done. He may bind his clients by written agreements out of Court or by oral agreements in open Court. He may discuss his client's case or consent to a judgment against him, and the client is bound by his action.
>
> "His right to appear for his client can only be questioned by the client. His adversary cannot force him to prove his right to appear for his client, nor will the Court do so except for special and peculiar cause. As a rule his state-

ments of fact, unless disputed, are accepted and acted upon by the Court as true. Countless judicial acts, many of them important, are daily done by the Courts upon unsupported statements of fact by lawyers, and in my judgment the business of the Courts could be done in no other way. Time would not permit proof by writing or by witness of every fact upon which the Courts must act. They must be able to rely upon counsel, and they do so, because the lawyer is acting as an officer of the Court under the sanction and responsibilities of an official oath."

—"The Lawyer's Official Oath and Office," Benton, page 7.

Mr. Benton then proceeds by referring to the Statutory history of the attorneys' oath to show that the oath is a condensed code of ethics.

F. W. G.

THE RIGHT TO OPEN AND CLOSE.

The following news item appeared in the *Boston Post* of July 12, 1924:

> "Sir Patrick Hastings, the attorney-general of the Labor Cabinet has announced that, so long as he remains in office, the government will not follow the long settled rule of making the closing argument in criminal cases. He will allow counsel for the defandant to have the last say.
>
> Sir Patrick made this decision on the eve of trial of several important murder cases which he is personally to try on behalf of the crown.
>
> In England and in America the government in criminal cases has always been given the right to open and close the case. This procedure has been so well settled that it has not been challenged in years.
>
> Sir Patrick thinks it is unfair and gives the prosecution too great an advantage. So he will allow the prisoner the final word, sum up when the defence has closed and then let the jury hear the defendant's counsel."

A somewhat different account of the matter appeared in the "Solicitors' Journal" of July 12, 1924, as follows:—

> "Sir Patrick Hastings, the Attorney General, has made a graceful concession to public opinion by refusing to exercise his technical right of final reply in *Rex v. Vaquier*, *Times*, 6th inst. It is true that he gave no undertaking to abandon this right; he based its non-exercise for the pur-

> poses of this one occasion on the special fact that the accused was a foreigner who laboured under peculiar difficulties, since he could not follow the evidence until it was interpreted to him, and did not apprehend the nature of English legal procedure. These are reasonable and generous grounds for the action of the Crown. But, evidently, where a concession of this kind is once made in the interests of justice, it is difficult to resist the claim of all prisoners to equal treatment; a British subject ought not to be subjected to a vicious and anomalous rule of procedure from which a foreigner is justly relieved. And at any rate it may be assumed that the right will not in future be exercised automatically, as has been the case in the past."

This news raises a similar question as to our practice in civil cases which was discussed by Felix Rackemann, Esq., in the following note reprinted from the November number of this magazine for 1916.

Mr. Rackemann's Note.

A query as to the right to "open and close."

In the establishment of modern court practice, and particularly of the rule which gives to the plaintiff the right to "open" and to "close," it was (and in some courts still is) a rule, somewhat rigidly enforced, that the plaintiff must "open" *fully* and *completely,* and would not be allowed, in closing argument, to urge anything which had not been clearly and fully "opened."

The object of these two rules was to secure at the same time (a) a complete opportunity to the plaintiff to make his case perfectly clear and satisfy the "burden of proof;" and (b) to guard the defendant against surprise by arguments and propositions which had not been "opened," and which he therefore might not have thought to answer.

Tempora mutantur!

1. Under our present Massachusetts practice the plaintiff is not in fact required to "open" in any such complete manner and it would perhaps be a waste of valuable time in many cases if he were.

2. The "burden of proof" is now more a theory than a practical consideration in 99 jury cases out of 100.

On the other hand the letting down of the bars as to the "opening" has permitted and gradually led to a different and objectionable practice too frequently resorted to in modern trials,

The plaintiff "opens" in a perfunctory way. He introduces his evidence and proofs and in doing so deliberately lays traps and pitfalls for his opponent in "scintillas" and carefully disguised words and suggestions.

The defendant without anticipation makes his closing argument and says his last word.

The plaintiff thereupon for the first time argues his *whole case* and springs all his traps and surprises.

Query: Might it not be fairer and productive of a more perfect justice in the long run if our rule were now changed so that the plaintiff should open his case as he pleases, and prove it as he may, and, having done so, argue it as he can; but that the defendant, having heard the *full statement* of the plaintiff's case, should then have the final argument in reply?

Or, in line with modern tendencies to do away with technicalities and have all the cards laid frankly down on the table, would it be any better to allow defendant a brief reply to any new matter or argument?

WEAKENING THE SANCTION OF AN OATH BY EXCESSIVE REQUIREMENT OF AFFIDAVITS.

THE SWEARING MILL.

(From Boston Herald of July 17, 1924.)

To the Editor of The Herald:

The registrar of motor vehicles has relieved the citizens of the commonwealth of about a half million of the hundred million or more affidavits hitherto imposed upon them. No more must we swear to the engine number of our cars, the bore of their cylinders, the horsepower they theoretically develop or the number of passengers they accommodate. It is rumored that the registrar of vehicles and the chairman of the commission on administration and finance do not see altogether eye to eye, but it will be a pity if the latter official does not scent the economies involved in this diminution of legalized profanity, and borrow a leaf out of the former's book. Think of the economy in cutting off the printing of a half million jurats, avoiding a half million signatures of attesting magistrates, in avoiding, too, for a large proportion of these, the additional statement as to the expiration date of their commissions (queer they

don't have to swear to this), and in saving the time wasted trying to get two persons together to perform the duty of one.

To attach an oath to every official and hundreds of unofficial acts, like the continuous enactment of legislation, in both of which errors Massachusetts holds the record, tends to defeat the very purpose for which oaths and legislation exist, by bringing both into contempt. Probably most of us will agree that the main purpose in requiring an oath is to impress the individual with the solemnity of his act, although doubtless there are those who would say that the purpose was to lay the foundation for a charge of perjury.

From either point of view, to carry oath-making to the extreme that makes a joke of the process of administering the oath defeats its purpose. So many oaths are required of every man of affairs that every private business office must have a magistrate in attendance, some subordinate usually being designated to operate the swearing mill just as one would be designated to wind the office clock or to lock the safe. Jurats are filled out in advance of signatures; oaths are taken over the telephone (the right hand held up before it); men swear to the best of their knowledge and belief about matters that they cannot possibly be familiar with; errand boys are sent to them to obtain their oaths off-hand to matters of belief so vague that no court would permit them to testify about them, or to pages of figures prepared by days and weeks of labor in which they had no share and for the accuracy of which they can vouch only because of their confidence in the persons who did prepare them. In these latter cases a voucher may be a proper assumption of responsibility, but the oath adds nothing to the voucher. And in all such cases not only is all the solemnity of an oath lost, but no conviction for perjury could possibly be had.

If 90 per cent. of the oaths required by Massachusetts laws and Massachusetts administrative regulations were to be remitted, as the oath to motor registration has been, it would not only save a vast volume of useless expenditure and useless labor (which is worse), but would raise the value of the other 10 per cent., and would eliminate a deal of genuine profanity now current both in the use of God's name in vain in the making of these useless oaths and in the more artistic and lurid types of irreverent expletives employed to express the contempt of the swearer for the process of swearing.

Candidates who are proclaiming in their platforms planks for the simplification of governmental processes and the reduction of governmental overhead might, by adding one for the elimination of

useless swearing, gain the enthusiastic support of all voters except that limited number who derive occasional fees from their usually gratuitous and rather demeaning service as petty magistrates. Perhaps even the magistracy itself might be restored to its old-time dignity if it were not so constantly devoted to trivial, well nigh menial service.

WILLIAM D. PARKINSON.

FITCHBURG, July 15.

Note.

The above letter recalls the answer of Professor Wambaugh to a question whether it was advisable to provide for an oath in the drafting of some statute. He said, "I think I would omit that customary invitation to perjury."

In the report of the recent Judicature Commission, of which Judge Sheldon was chairman, appears the following sentence on page 106: "We think that the use of perfunctory certificates and affidavits in connection with very many papers today is overdone, and the common requirement of an oath, instead of adding any special sanction to the document thus sworn to, rather tends to bring the sanction of an oath into contempt." Mr. Parkinson's practical elaboration of this idea in his letter is refreshing.

I suggest for the consideration of the next Legislature that this peculiarly irritating form of annoyance of ridiculous and unnecessary oaths is a subject of sufficient importance to cause an examination of the statutes for the purpose of eliminating such absurd requirements where there is no necessity for them and restoring to the sanction of an oath in Massachusetts some of the seriousness which it is intended to have. It must be simple by the appropriate use of words to provide adequate penalties for the signing of false or careless statements, when needed, without requiring the abuse of an oath as is done by the present practice all over America. Here is an opportunity for Massachusetts to take the lead in setting a standard of common-sense, convenience and practical ethics between government and citizens.

F. W. G.

MORE ABOUT THE MASSACHUSETTS REPORTS.

The method of reporting and indexing cases has been a subject of discussion among members of the bar for a good many years. The growing volume of reported decisions all over the country has been the subject of recommendations of bar associations, etc. For a number of years, there was a committee of the American Bar Association on reports and digests. As a result of the work of that committee, a memorial was adopted by the American Bar Association to be formally presented to the members of all the Appellate Courts in the country as well as to the Justices of the Supreme Court of the United States and of each Circuit Court of Appeals. This memorial, together with an address by Hon. John W. Davis relating to the subject, was printed in the MASSACHUSETTS LAW QUARTERLY for February, 1918, page 97. An extract from the report of Attorney-General Atwill in 1916 relating to the subject was printed in the QUARTERLY for February, 1916, page 18.

In the May number we printed an account by the reporter himself of the plan of reporting and indexing followed in Massachusetts. No one who knows the present reporter and the serious interest which he takes in his work will misunderstand the printing in this number of the views and suggestions of Mr. Rackemann on the subject. His criticism is not of the reporter but of the plan of reporting and indexing. The art of reporting and indexing, like the art of writing judicial opinions has to do in a marked degree with the sound development of the law and improvement in the administration of justice. Both are public functions calling for public discussion. There are differences of opinion at the bar as to what is wanted as best adapted to the purpose at the least reasonable expense. One practical problem suggested by Mr. Rackemann's paper is, whether the commonwealth and the bar can afford to indulge in so luxurious an index to each volume of the accumulating reports. The writer, while appreciating the reporter's work, is inclined to agree with Mr. Rackemann that an index on the plan of Kellen's Digest would be sufficient. Would it not be worth while if the experiment were tried for a number of volumes to see how it worked?

The Publication Committee believes that an expression of opinion from members of the bar in regard to questions raised by the following discussion would be of assistance both to the court and to the present reporter in order that they may consider how, and in

what form, the reports may be made of greater service and relatively less expense, in money and storage space, to the profession. Such expression of opinion, therefore, is hereby invited. The Reporter's explanation of his plan and reasons for it in the May number should be read. The size of Volumes 245 and 246 has been materially reduced by the change in the paper, but the index is still over 100 pages in each volume.

F. W. G.

MR. RACKEMANN'S LETTER.

To the Editor of the Massachusetts Law Quarterly:

Is the Bar satisfied with the present reporting of our State Supreme Court? Certain comparisons are interesting. In three recent volumes of our Reports 1841 pages are given to the headnotes and opinions, while 394 pages are given to a reprint of the same headnotes in different type at the end of the volumes. Thus about 21% is reprint duplication.

In three recent U. S. Supreme Court Volumes 1955 pages are given to the regular reports, and 189 pages to the indices at the end, or about 9½%.

In the Massachusetts Volumes there are very many cases in which the small-typed syllabi take up a full page and many taking up two or three pages and one taking up seven pages.

In the U. S. Volumes the syllabi are *much* less voluminous.

In the Massachusetts Reports no mention is ever made of the cases or points presented to the Court and relied upon by counsel. In the U. S. Reports, in many cases, the contentions of counsel are briefly noted. Take, for example, Massachusetts Volume 243, in advance-part form, three parts in all. On two pages of the covers is an index. If counsel is looking for any recent decision does he experience any difficulty in taking these two page indices and discovering whether or not there is, in the "Part" any case which interests him?

If he finds a case is it any trouble to turn to the page and there read the headnote? If not, six pages of index might really suffice for volume 243, instead of perhaps 130.

The volumes are increasing very fast and are expensive. The space now taken by the indices in the backs of four volumes would nearly print the regular report of one.

Is it not much better to get a hint as to the case and then read the actual report of it than to rely on headnotes? Does not the

Kellen digest really point to the cases? Might not the Federal plan be to some extent wisely adopted in Massachusetts? Are there not frequent cases in which we now have to go to the Library and look up the records to see what was really before the Court? Might not some of this time be saved by fuller reporting with less duplication? Do we not frequently lay down the report of a case wishing that we might know more as to what points were made in argument and hence considered by the Court?

If it be said that the Federal plan would put a great labor on the Reporter is not one answer that in most cases counsel would, on request, cheerfully furnish the Reporter with a brief statement of the points and authorities presented in his case?

Will the Bar express itself on these questions?

FELIX RACKEMANN.

EXTRACT FROM "SEVENTY-TWO YEARS AT THE BAR", OF SIR HARRY B. POLAND.

BY ERNEST BOWEN-ROWLANDS.

"Harry Bodkin Poland was born in London in the year 1829. . . . His professional career as a Barrister lasted from 1851 to 1895, and during all that time he had a large practice, not only in criminal courts, where he was for very many years (1865-1889) Counsel to the Treasury and Adviser to the Home Office; but in other courts as well. For long years he was the chief authority on 'Licensing,' and 'Rating'. He was frequently retained in 'Election Petition' cases; was recognized as the greatest authority on Parish Law; appeared in some great causes in the Ecclesiastical Courts; and conducted many important State Trials" (pp. 2-5).

The following practical comment of Sir Harry Poland (who is still living) quoted in the book is interesting.

" 'In that period it was customary at the beginning of each legal year for the Judges to make a Rota of Judges to attend at the Old Bailey throughout the year, and try the more important cases which were reserved for them in the 'Judge's List' '.

'The practice as to the making of a Rota is still kept up, but the remainder of it is not.

'For then, all Judges on the Rota for any session sat together during that session; there were always two, and sometimes three of them. That was an admirable system, not only because it brought to bear two or three trained intellects on the fate of a prisoner, but because it led to uniformity of sentences.'

'May I ask why?'

'Because, when the two or three Judges considered their judgment in any case, they blended their minds on the consideration of the principles applicable to the facts of the case before them; and after when they went separately on circuit, and sat singly to mete out punishment, they remembered what the principles were on which they had generally acted before, and knew how to act upon them. The practice was invaluable to a neophyte Judge. I may say that the last time three Judges sat at the Old Bailey was in 1883 in the Dynamitards case.' '' (pp. 20-21.)

Note.

This judgment from so experienced a prosecutor deserves attention in connection with the suggestion in the May number that we should try the experiment of a reviewing board for the summary revision of sentences in the Municipal Court of the City of Boston as an alternative to the right of appeal to the Superior Court on the whole case. F. W. G.

A LAYMAN'S VIEW OF A TAX REFERENDUM.

In the ''Monthly Letter'' of George S. Mumford, Esq., President of the Commonwealth Atlantic National Bank, for October, 1923, appears the following—

> ''Massachusetts is making a new use of its popular referendum. At the next state election each voter will signify whether he or she desires to pay a certain tax. As a general proposition it would appear to be unnecessary to go through this form, for the result would seem to be a foregone conclusion. It it not pleasant to pay any tax, and is any person likely to vote on his own free will to have a tax levied on himself, if the question be put up to him for his own decision? It is recognized that taxation is necessary and we expect our representatives when they convene to decide on the form taxation shall take. For them to evade this would be to shirk their chief duty. The members of the Legislature are in an impartial position and are able to take a general survey of the needs of the State and can divide the burden with some degree of justice.
>
> ''The special tax on the sale of gasoline seems as reasonable as any sales tax could be.
>
> ''The use of motor cars has enormously increased the burden on the taxpaying community. Our city streets are crowded with cars, and the problem of maintaining our pavements and handling the traffic is a very expensive problem. Our real estate taxes and all other taxes are rapidly increas-

ing, more as a result of this than from all other causes combined. What can be more natural than for the owners and users of cars to be looked to to pay a substantial part of this expense?

"We have long been accustomed to look to the owners of real estate to pay relatively heavy taxes for what they get out of the community. The police and fire protection, the street improvements and removal of refuse is part of what they get in return. And now a new and different form of occupancy of the cities has developed. The house owner is at least a passive incumbrance on the land, but the automobiles are by no means passive, and yet as compared with the land owner they contribute almost nothing for the privileges they enjoy.

"It is time that this whole matter should be taken up intelligently and systematically. A careful study should be made of the question, for many think that motor car owners should be taxed so as to bear what they believe to be their fair share of the burden. This preposterous referendum may do good in helping to educate the public to the need of taking intelligent action. It does not appear necessary, however, to dash at the matter, as has been done in some foreign countries and place such excessively high taxes on the automobiles themselves as to make their use almost prohibitive, but reasonable taxes on their use and operation, such as this gasoline tax was intended to be, could be devised to meet the new conditions they themselves have created.

"All this, however, is more or less beside the point. The fact that the voters under the referendum system should be able to pass on matters of taxation is all wrong. If separate taxes can be treated in this fashion, the only ones that would stand and be popularly approved would be special taxes on a small proportion of the population.

"If a tax like this gasoline tax be allowed to be subject to the referendum at all, it should at least be accompanied by one or more alternative measures for raising a similar amount of money and so offer the public a chance to choose which it prefers."

Note.

Since we have the referendum machinery we have got to learn to vote intelligently under it. The Legislature has expressed its judgment in passing the tax act. It cannot prevent a referendum or submit alternative measures on the ballot as Mr. Mumford suggests. It is only on initiative petitions that the Legislature can submit alternative measures on the ballot. F. W. G.

ESTIMATES OF JEREMIAH MASON BY WEBSTER AND CHOATE.

The following passages appear in John C. Gray's account of Jeremiah Mason in "Great American Lawyers," Vol.

"'If you asked me,' once said Daniel Webster, 'who is the greatest lawyer I have known, I should say Chief-Justice Marshall, but if you took me by the throat and pushed me to the wall, I should say, Jeremiah Mason.'

"And, down to the present day, such has continued the reputation in New England of this farmer's son, gigantic in stature (for he stood six feet six), plain, quiet in manner, often homely of speech, but with a vision into the law and facts, a power of clear statement and a force of sarcasm seldom equalled; while his common sense and a knowledge of human nature amounting almost to genius, made him the most successful of advocates and the wisest of counsellors."

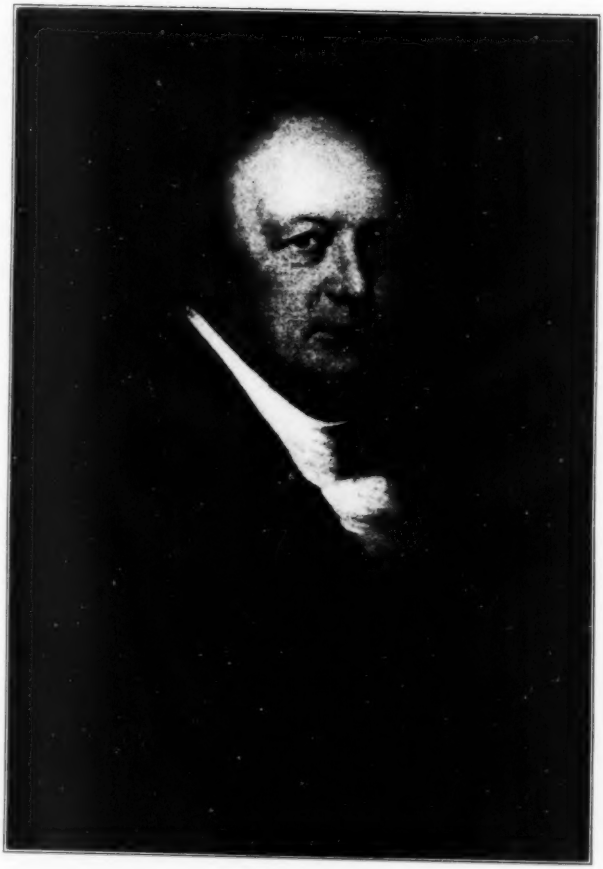
Jeremiah Mason was born at Lebanon, Connecticut, in the year 1768. Beginning in New Hampshire, as a young man, he practiced there until 1832, besides serving as United States Senator from 1813 to 1817. In 1816 he declined an offer of the position of Chief Justice of New Hampshire. With Jeremiah Smith he argued the Dartmouth College case in the State Court and laid the foundations of Webster's later argument in Washington.

"In 1832 Mr. Mason established himself in Boston, where he continued in active practice until, in 1838, upon completing his seventieth year, he, in accordance with a resolution formed long before, retired from the courts; but he continued to act as chamber counsel, until his death at the age of eighty, in the year 1848."

At the age of 65 he tried the noted murder case of State v. Avery to a jury at Newport, R. I., for the defence and secured an acquittal.

"At a meeting of the Boston Bar to take action upon Mr. Mason's death, Mr. Choate said:

> "'It seems to me that one of the very few greatest men whom this country has produced; a statesman among the foremost in a Senate, . . . a jurist who would have filled the seat of Marshall as Marshall filled it; of whom it may be said, that, without ever holding judicial station, he was the author and finisher of the jurisprudence of a State; one



JEREMIAH MASON.

whose intellect, wisdom and uprightness gave him a control over the opinions of all the circles in which he lived and acted, of which we shall scarcely see another example, and for which this generation and the country are the better to-day; such seems to me the man who has just gone down to a timely grave. . . . He is dead; and although, here and there, a kindred mind—here and there, rarer still, a coeval mind—survives, he has left no one, beyond his own immediate blood and race, who in the least degree resembles him.' ''

THE IMPORTANCE OF DRAFTSMANSHIP AS ILLUSTRATED BY SENATOR EDMUNDS AND THE ACT CREATING THE ELECTORAL COMMISSION IN 1876.

The following extract from an exceptionally readable book of reminiscences will interest the bar.

EXTRACT FROM ''A CHAUTAUQUA BOY IN '61 AND AFTERWARD''.
(Page 240)

(Recollections of David B. Parker, 2nd Lieut. 72nd N. Y. Detailed Supt. of the mails of the Army of the Potomac. U. S. Marshal, District of Virginia. Chief Post Office Inspector.)

''I do not know that the following incident occurring in the United States Senate has ever passed into permanent print. When the draft of the law creating the Electoral Commission had been agreed upon by Tilden and his advisers and the Republican leaders, it occurred to someone to ask George F. Edmunds, Senator from Vermant, to examine it and see if he could make any suggestions. He took the bill and brought it back with the suggestion that the two words be added, 'if any.' It was conceded by the Republicans that Edmunds, with his great ability, must have a good reason for making the suggestion so they submitted it to Mr. Tilden's advisers, who saw no objection, and the law was passed containing those two words, 'if any' and those two words seated Mr. Hayes in the White House. When the results from the returning boards of the contested States of the South were under examination, the question arose whether the Commission should go behind the returns or not. The words 'if any' made it optional with the Commission, and not mandatory, to go behind the returns, and the Commission voted not to do so, eight to seven. Later, when the Senate was in executive session, Senator Thurman, of Ohio, who was a very intimate friend of Senator Edmunds,—one a Republican and the other a Democrat, but both serving upon the Judiciary Committee, and one or the other being Chairman, according to whether

the Republicans or Democrats had control of the Senate,—arose, as he said, to perform a somewhat painful duty. He had been asked to formulate an epitaph for the tomb, when the occasion came, and he hoped it would be long distant, which should hold the remains of one of our most distinguished Senators. This was the inscription: 'Here lie the remains 'if any' of George F. Edmunds of Vermont.' The Vice-President promptly directed the matter to be excluded from the record, but the dignified Senators enjoyed their laugh at the expense of the Republican leader."

Note.

Statutory Draftsmanship in Massachusetts, as compared with many States, has been careful; but since the report of the Committee on Legislative Procedure, in 1914 (H. Doc. of 1914), there has been a marked advance in the plan of Legislative progress. Few men realize the amount of painstaking work which is done by Messrs. William E. Dorman, Counsel to the Senate, and Henry D. Wiggin, Counsel to the House, often under great pressure, in all stages of Legislation. This seems a fitting place to support and encourage their enthusiastic interest in their work by a public expression of appreciation.

F. W. G.

REPORT OF COMMITTEE OF THE NEW YORK CITY BAR ASSOCIATION FOR THE PROPOSED AMENDMENT OF ARTICLE V OF THE CONSTITUTION PRESENTED TO SIXTY-EIGHTH CONGRESS, FIRST SESSION.

Three joint resolutions have been introduced in the Senate and four in the House providing for the amendment of Article V of the Constitution containing provisions for its amendment. Of these the best known and the most conservative is the Wadsworth-Garrett amendment introduced in the Senate by Hon. James W. Wadsworth, Jr., of New York (S. J. Res. 4), and in the House by Hon. Finis J. Garrett, of Tennessee. (H. J. Res. 68.) This amendment has sometimes been called the "Back to the People" and "New Bill of Rights" amendment. The joint resolution is as follows:

> "RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled (two thirds of each House concurring therein), That the following article, in lieu of Article V, be proposed to the several States, as an amendment to the Constitution of the United States, which shall become valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the several States:
>
> "'Article ——. The Congress, whenever two-thirds of each House shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by three-fourths of the several States through their legislatures or conventions, as the one or the other mode of ratification may be proposed by the Congress or the convention: *Provided, That the members of at least one house in each of the legislatures which may ratify shall be elected after such amendments have been proposed; that any State may require that ratification by its legislature be subject to confirmation by popular vote; and that, until three-fourths of the States have ratified or more than one-fourth of the States have rejected or defeated a proposed amendment, any State may change its vote:* And provided further, That no State, without its consent, shall be deprived of its equal suffrage in the Senate.'" (The italics indicate the proposed additions.)

Of the other proposed amendments four provide for amendment of the Constitution by a majority vote of electors of three-fourths of the States with minor differences as to form and language (S. J. Res. 17; H. J. Res. 34; H. J. Res. 37; H. J. Res. 133); and the fifth provides for a double majority vote of all voters qualified to vote for the election of members of the House of Representatives, namely, a majority of those who vote on the measure in a majority of the congressional districts and a majority of all the votes cast thereon (S. J. Res. 27). These other proposed forms of amendments have apparently not been drawn with the same care and have not received the same popular support as the Wadsworth-Garrett amendment. To substitute a popular vote for action by the State legislatures, in the opinion of your committee, is a more radical change than is advisable.

The Wadsworth-Garrett amendment, while retaining the State legislatures or conventions as the ratifying body by its additional requirements, secures to the people the fundamental power of amending the Constitution. The first two provisos proposed to be added by this amendment were apparently framed to meet the two recent decisions of the United States Supreme Court.

In the case of *Leser* v. *Garnett*, 258 U. S. 130, the Supreme Court in considering the validity of the ratification of the Nineteenth Amendment held unconstitutional a provision of the Constitution of Tennessee providing that the members of the State legislature could not assent to any Federal amendment proposed subsequent to their election.

In *Hawke* v. *Smith*, 253 U. S. 221, the Supreme Court held unconstitutional a provision of the Ohio constitution reserving to the people the power of the referendum on the action of the State legislature ratifying any proposed amendment to the Constitution of the United States.

It has been stated at hearings before the Senate on the Wadsworth-Garrett amendment and in the briefs of counsel in these last named cases that twelve State legislatures elected on other issues ratified the Eighteenth Amendment, and that thirty-four of the thirty-six legislatures that ratified the Nineteenth Amendment were elected on other issues. It has also been stated that in connection with the ratification of the Nineteenth Amendment that five State legislatures ignored the express provisions of their own State Constitutions, and thirteen of them ignored unfavorable referenda on the question of Woman Suffrage.

The third proposition proposed to be added by the Wadsworth-Garrett amendment granting the right to any State to change its vote until three-fourths of he States have rejected or defeated a proposed amendment establishes a rule upon which there have been no decisions. It has generally been conceded that a State which has rejected an amendment may reconsider its decision and later ratify the amendment. However, it has never been definitely settled whether a State which has ratified an amendment may later reject it.

The Wadsworth-Garrett Amendment will make the amendment of the Constitution more difficult. In retaining the State legislatures as the ratifying body, subject to control by popular vote, it will avoid the danger of hasty, uninformed, popular action. Finally, it will lessen the danger of the passage of amendments through pressure on State legislatures by propaganda, organized lobbyists and other more discreditable means. To show such danger under the present system, it was pointed out on one of the hearings that under the present Article V of the Constitution, which now requires ratification merely by thirty-six legislatures, namely, those of three-fourths of the States, 673 State Senators, 1,643 State Representatives, or 2,316 legislators in all can ratify a Federal amendment, representing less than 32% of the total number of legislators in 48 States, and also being a comparatively small number of men to effect such an important matter as a change in our Constitution.

The Wadsworth-Garrett Amendment has had wide support throughout the country in the public press and by various public bodies and was advocated before Congress by distinguished lawyers and representative citizens.

Senator Wadsworth introduced the same joint resolution in the 67th Congress, S. J. Res. 40, which was identical in form with the present resolution except that it was proposed to submit the article for ratification to State Conventions rather than the State Legislatures. This resolution was recommended for approval by your Committee in its annual report dated March 13, 1923.

The Senate Committee on the Judiciary, to which the Wadsworth resolutions, S. J. Res. 4, was referred, reported favorably thereon with an amendment. This amendment materially changes the form of the Wadsworth resolution by substituting for ratification by the legislatures of three-fourths of the States a provision for ratification by popular vote in such States and substituting for the clause as to qualification of the members of the Legislature to

vote on the amendment, a clause that any amendment shall be inoperative unless it shall have been ratified within six years from the date of its submission to the States, and making certain minor changes. This amendment by the Senate Judiciary Committee is known as the so-called Walsh Substitute. In the opinion of the Committee the original form of the Resolution is better than the amended form recommended by the Judiciary Committee.

Your Committee reports that the Wadsworth-Garrett Amendment merits the approval of the Association both as to its form and as to its substance and proposes the following resolution for the consideration of the Association:

> RESOLVED, That the Wadsworth-Garrett Amendment to Article V of the Constitution embodied in Senate Joint Resolution 4 and House Joint Resolution 68 in the Sixty-Eighth Congress, First Session, providing for certain restrictions in the method of the amendment of the Constitution be and the same hereby is approved.

MARCH 10, 1924.

Respectfully submitted,

SAMUEL GREENBAUM,
Chairman.

ARCHIBALD A. GULICK,
Secretary.

MUSSOLINI, MACHIAVELLI AND JOHN ADAMS.

In view of the recent progress in various parts of Europe, through Communism and unrestrained government of one kind or another, to dictatorships, and the agitation of some people in this country for similar reactionary experiments and abolishment of the Constitutional restraints which are part of the American national character, it is peculiarly interesting to get a brief statement of the philosophy of a conspicuously able, successful, modern dictator, and to compare it with some of the ideas expressed in 1776 by a Revolutionary thinker from Massachusetts whose vast influence on American government and character through the constitutions of the various states and of the United States is still little realized by the American people.

Accordingly, the statement of Mussolini's views, which appeared in the "Boston Transcript" of June 11, 1924, is here reprinted, together with extracts from the paper entitled "Thoughts

on Government," written by John Adams and sent to George Wythe, Patrick Henry, Richard Henry Lee and others in Virginia in 1776 in reply to a request for his advice as to the best methods of accomplishing the transition from the discarded royal government to a popular government in the various colonies. After reading these pages, we may well pause and reflect on the meaning of the great American experiment of a restrained republic and the reasons for its success thus far.

To what extent was this success due to the moral and spiritual influence of the best thinking and "practical sagacity" of John Adams and his contemporaries? It is easy to pick faults in John Adams. He offers ample opportunities for that form of amusement, but, Americans will do well to study him at his best. Why was he "eminently qualified to stand forth the exponent of a clear, strong and noble plan of action in a time of danger?" John Adams was familiar with Machiavelli's "Prince." Suppose he and his contemporaries had agreed with Mussolini in the emphasis on *fear* as a foundation of government—what would have happened?

In this connection, those who have any taste for philosophical reading and the "long distance" connection between theories, standards and practical results in life, government and civilization, will be interested in an exceptional little book which has just been published by Houghton, Mifflin Co., written by Prof. Irving Babbitt, entitled "Democracy and Leadership". It covers the history of thought and successive enthusiasms from Confucius to Henry Ford in a way which emphasizes W. G. Sumner's remark "that education in the critical faculty," using the words in the sense of conscious selection resulting from standards, is the most important education.

The Folly of Democracy.

By Benito Mussolini.

(From Boston Transcript June 11, 1924.)

The Fascisti of Imola have presented me with a sword upon which is engraved a motto of Machiavelli, "You cannot maintain a State by words." Pondering over this inscription, some observations occurred to me which I should like to record. I might, perhaps, be permitted to call them comments on Machiavelli's "Prince" from the standpoint of the year 1924. I believe Machiavelli's "Prince" to be the statesman's supreme guide. But I must admit from the outset that I have no great pedantic insight into Machiavelli's works. I have, of course, carefully read "The Prince" and the other works of Machiavelli; but I have neither had the time nor

the wish to read all the commentaries on Machiavelli's writings, which have been so laboriously composed, in every country of the world. Indeed, I desire no prejudiced interpretations or portentous "footnotes" to interfere with my views on Machiavelli. I want to preserve the direct contact between his doctrine and my life as I have lived it, between his and my thoughts on men and affairs, between his and my practice of governing. My article is not, therefore, a dry scholastic one bristling with quotations from other people. It might rather be called a living criticism or an attempt to throw a bridge of thought over the abyss of generations and events.

I cannot, of course, say much that is new. But the question may be asked: after a lapse of four centuries does life remain in that great work, "The Prince"? Is it possible that Machiavelli's advice may still be of some use to modern statesmen? Is the value of the political system given in "The Prince" limited to the period during which the book was written? Is it out of date, or is it universal and everlasting? My answer is that Machiavelli's doctrine is alive today even more than four centuries ago, because though the outer aspect of life has greatly changed, no deep changes have occurred in the minds of men or in the actions of nations.

Politics are the art of governing men, that is to say, leading, utilizing and educating their passions, their desires, and their interests for the benefit of the general order which necessarily governs individuals and provides for the future of nations. Man is the fundamental element of the art of politics. By holding to this elementary principle much can be learned from Machiavelli. What does Machiavelli think of men? Is he an optimistic or pessimistic judge? Machiavelli's survey of mankind is not limited by nationality or time. It is less concerned with his contemporaries, or fellow countrymen, than with all generations of human beings of every race and class.

Before proceeding to a more analytical examination of Machiavellian politics I must endeavor to interpret correctly that conception he had of men in general. Anyone who has read "The Prince" must observe his acute pessimism regarding human nature. Like everyone who has had long and intimate relations with his fellow-creatures, Machiavelli is rather inclined to despise men's motives and is forced to judge their actions without allowing overmuch for fervor or idealism.

"Men," according to Machiavelli, "are generally more inclined to submit to him who makes himself dreaded than to one who merely strives to be beloved; and the reason is obvious, for friendship of this kind, being a mere moral tie, a species of duty resulting from a benefit, cannot endure against the calculations of interest; whereas fear carries with it the dread of punishment, which never loses its influence."

As regards human egotism, I would quote from his Miscellaneous Letters: "Men regret more a power which is taken from them,

than a brother or father whom death has taken from them, because death is sometimes forgotten, but property never." An even more striking quotation can be made from Machiavelli's "Orations": "As is proved by all who thoughtfully consider civil life, and as history is full of examples, it is necessary for anyone who establishes a Republic and orders laws therein to presuppose that all men are bad and that they will always apply the malignity of their mind when they have an opportunity. . . . Men never work for good except under compulsion. Where freedom is carried to excess, thereby degenerating into license, anarchy and confusion must prevail."

I might make many further quotations, but it is not necessary. The extracts I have made must surely show how deeply founded was Machiavelli's understanding of human nature. I think it will be admitted that Miachiavelli's remarks apply to our generation just as much as they did to his own contemporaries, the Florentine, Tuscan, and Italian horsemen, who flourished between the fifteenth and sixteenth centuries.

If I am permitted to judge my fellow creatures and contemporaries I cannot in any way depart from the conclusions of Machiavelli. In fact, I have to be even more severe.

Machiavelli had no delusions and does not delude the Prince. The term "Prince" must be understood to be the State. While individuals, under the shadow of their own egotism, tend to social decay, the State represents organization and limitation. The individual continually attempts to disobey the laws of the State. He hates to pay taxes. He endeavors to avoid his obligations to service in war. There are very few heroes and saints who are now prepared to sacrifice themselves on the altar of the State. But there are many citizens willing to upset the altar and sacrifice the State for their own purposes. The French Revolution and other revolutions were an attempt to make Government subject to the free will of the people. This theory is based on foolishness and untruths. Why? First of all, the people have never been defined. Such a theory is merely a political abstraction. No one knows where it commences or where it ends. The adjective sovereign applied to the people, is a tragic farce. At most, the people appoint delegates, but it is absurd to suppose that the people exercise sovereignty. There is little moral justification for representative government, but a great deal can be said for its mechanical usefulness. Even in countries where representative government has always obtained, a time occurs when it is fatal to consult the people. In times of war the cardboard crown of sovereignty is stripped from the people (for it is only fit for normal times), and the people have no alternative but to plunge into the unknown perils of war or to declare for revolution. For such occasions the people have but one duty to affirm and obey. It is evident that the sovereignty graciously granted to the people is taken from it at the time when it is most needed. In fact, it is only allowed to continue when it is innocuous, or considered as such, that

is to say, during the placid course of ordinary administration. Concerning this point I should like to submit this question: Can anyone imagine a war being declared by referendum? A referendum is a very good thing when it is a question of choosing the best spot for placing the village pump. But when the supreme interests of the people are at stake, even the most ultra-democratic governments take care not to submit them to the judgment of the people.

Governments based exclusively on the will of the people have never existed, do not exist, and will probably never exist. I am supported in this view by a pregnant quotation from Machiavelli's "Prince": "Armed prophets conquer; those who are unarmed are ruined. Because the nature of peoples is changeable; and while it is easy to persuade them of a thing, it is difficult to maintain them in the same persuasion. Therefore, it is well to arrange things so that when people no longer believe, they could be made to believe through force. Moses, Cyrus, Theseus, and Romulus, would not have been able to enforce their constitutions for long had they been disarmed."

EXTRACTS FROM JOHN ADAMS "THOUGHTS ON GOVERNMENT."

In January, 1776, George Wythe, one of the leaders in Virginia, asked Adams for advice as to the method of accomplishing the transition in government, and a paper entitled "Thoughts on Government" was then written and sent to Wythe, Patrick Henry, Richard Henry Lee, and others, both in Virginia and elsewhere. In this paper appear the following passages (see Adams' Works, Vol. 4, pp. 188-209):

"Pope flattered tyrants too much when he said:

> **'For forms of government let fools contest,**
> **That which is best administered is best.'**

Nothing can be more fallacious than this. But poets read history to collect flowers, not fruits; they attend to fanciful images, not the effects of social institutions. Nothing is more certain, from the history of nations and nature of man, than that some forms of government are better fitted for being well administered than others. . . .

"*Fear* is the foundation of most governments; but it is so sordid and brutal a passion, and renders men in whose breasts it predominates so stupid and miserable, that Americans will not be likely to approve of any political institution which is founded on it.

"Honor is truly sacred, but holds a lower rank in the scale of moral excellence than virtue. Indeed, the former is but a part of the latter, and consequently has not equal pretensions to support a frame of government productive of human happiness.

> "The foundation of every government is some principle or passion in the minds of the people. *The noblest principles and most generous affections in our nature, then, have the fairest chance* to support the noblest and most generous models of government.
>
> "A man must be indifferent to the sneers of modern Englishmen, to mention in their company the names of Sidney, Harrington, Locke, Milton, Nedham, Neville, Burnet, and Hoadly. No small fortitude is necessary to confess that one has read them. The wretched condition of this country, however, for ten or fifteen years past, has frequently reminded me of their principles and reasonings. They will convince any candid mind, that there is no good government but what is republican. That the only valuable part of the British constitution is so; because the very definition of a republic is 'an empire of laws, and not of men.' That, as a republic is the best of governments, so that particular arrangement of the powers of society, or, in other words, that form of government which is best contrived to secure an impartial and exact execution of the laws, is the best of republics. . . ."

He then outlined the general plan of representative government which in its main features with modifications was subsequently followed in American States.

As one of the forewords to Professor Babbitt's recent book, "Democracy and Leadership," appears the following quotation from John Adams:

> "The fundamental article of my political creed is that despotism or unlimited *sovereignty* or absolute power is the same in a majority of a popular assembly, an aristocratical council, an oligarchical junto and a single emperor—equally arbitrary, cruel, bloody and in every respect diabolical."
>
> John Adams' letter to Thomas Jefferson (13 November 1815)

All John Adams' thinking and influence was in the direction of checking "absolute power". This was the reason for the division of functions, legislative, executive and judicial, and the double legislative chambers by which the people could think twice through their representatives.

In the course of his book, Professor Babbitt, after referring to the views of Locke and Montesquieu, says,

> "The framers of the American Constitution . . . possessed in a marked degree something that can scarcely be claimed for Montesquieu . . . *practical sagacity*" (p. 63).

And later on he says,

> "It is a fortunate circumstance that the very word 'sovereignty' does *not* occur in our constitution. The men who made this constitution were for granting a certain limited power here and another limited power somewhere else and absolute power nowhere" (p. 306).

The theory of "sovereignty", whether legislative or popular, is an application of the idea which was formerly expressed as the "Divine Right of Kings" or, the unlimited supremacy of Parliament, which contributed largely to the American Revolution.

F. W. G.

HOW MUCH "PRESUMPTION OF VALIDITY" IS THERE IN REGARD TO DIRECT LEGISLATION?

It is important that the courts should develop a sound sense of perspective in regard to "presumption of validity" in constitutional law for the time is approaching when some theory of popular "sovereignty" in connection with direct legislation by popular vote on measures adopted under the I. and R. will be urged upon them and must be considered. The Oregon school law is a sufficiently striking example. And the language of "presumption" has already appeared in a dissenting opinion in *239 Mass. at p. 398.* What kind of presumption is there? The amendment to the Massachusetts Constitution adopted in 1919, providing for the I. and R., expressly recognized the judicial function in regard to direct legislation by providing that,

> "The limitations on the legislative power of the General Court in the constitution shall extend to the legislative power of the people as exercised hereunder."

The word "people" in this sentence carries, of course, its political meaning of *majority of voters* in their representative capacity (See 226 Mass. 610), and not the broader constitutional meaning of *all the people,* men, women, and children, whether voters or not, in connection with the bill of rights. The question of applying constitutional standards to such direct legislation concerns not merely the power, but the duty, of casual voting majorities. It concerns the rights and interests of all the people whether voters or not and the interests of posterity which voting majorities are constitutionally bound to respect as much as a legislature. Something more intelligible for practical purposes than *"Vox populi, vox Dei"* will be needed as a constitutional standard.

Does the I. and R. create a fourth co-ordinate department of the state governments? If so, what is it? Is it the ten original petitioners who collect the signatures? Is it the casual voting majority who can only say "Yes" and "No" to a question on the ballot? Is it the fifteen thousand or more signers, many of whom sign petitions in a careless manner, with which we are all familiar, because some one asks them to? Does any "presumption of validity" of any kind attach to measures adopted by a majority of voters who vote on them on an *initiative* petition; or any additional "presumption" arise from a ratification of a legislative act on a *referendum* petition and, if so, how much? What body of individuals has any special responsibility in the matter resembling that of the legislature on which to base a presumption? These questions should be thought about in advance.

Since initiative measures are forced on the ballot against the judgment of the legislature, because the legislature does not enact them, it might be argued that the presumption, if any, would be against the validity of such measures because of the respect due to the judgment of the legislature as a co-ordinate branch of the government with special responsibilities. But that position would be unsound. Of course, a court would consider such measures with great care, but that is very different from a "presumption". There is apt to be an element of "fiction" in "presumptions".

Whether we believe in the I. and R. as a sound piece of governmental machinery is neither here nor there. We have it and we must study it fairly in order to understand it.

The I. and R. consists of two separate machines of government, the initiative and the referendum. While they have always been "politically" inseparable, they are in fact very different. Since we have them we must see that there are obviously greater opportunities for abuse of power and oppression by majorities under the initiative than under the referendum. The human facts involved in each of these exceedingly human and powerful machines of government must be remembered. Such "initiative" measures as the Oregon school law must make us pause and consider the possibilities of despotism threatened by the "fiction" of an alleged "popular sovereignty" of casual voting majorities instigated by petition-signers and perhaps by "collective logrolling" on a vast scale and of a secretive, fanatical or prejudiced character.

The so-called "presumption" that everybody knows the law, is merely a way of saying that knowledge of the law for some purposes of government is immaterial; but that can hardly be used as

a basis for a "presumption" that a voting majority, or group of petition signers, have carefully considered the constitutional rights of all the people or, even of themselves. The "presumption of validity" of legislative acts is based we are told on the assumption "that virtue, sense and competent knowledge are to be attributed to" the legislature as the "majestic representative of the people". Granting the theory, what are its practical limits? The words are large ones. Where do they land us? They are the words of James B. Thayer written before the days of the I. and R. which has been adopted partly because of popular distrust of legislative bodies, thus reducing to some extent their "majestic" aspect. *Some* of the people by adopting the I. and R. have taken over *some* legislative power over *all* the people. Now when *some* of the people use this power to pass an act like the Oregon school law how much "presumption" is there that the constitutional rights of *all* the people have been considered? Does not our constitutional system require the courts, in the interests of justice to all the people, to face the human facts as well as the fictions of collectivism? These questions are raised to be thought about by the bench and bar. Fortunately there is no immediate occasion for the answer to them in Massachusetts, but the occasion may arise in future. (Cf. MASS. LAW QUART., May, 1923, 70-73.) (Cf. Quotation from Judge Bruce, pp. 48-49 of this number.) F. W. G.

THE CLIMAX OF THE DEBATE OVER RATIFICATION OF THE FEDERAL CONSTITUTION IN MASSACHUSETTS IN 1788—THE SPEECH OF JONATHAN SMITH OF LANESBOROUGH.

Few of us realize the amount of common sense which men from Berkshire County have injected into Massachusetts and United States history. In previous numbers of this magazine an account has been given of the "Berkshire Constitutionalists" and their leader, Thomas Allen, to whose energy, initiative, and power of statement in the movement to get a constitution we probably owe as much as to the constructive thinking [and power of statement] of John Adams and Theophilus Parsons in its draftsmanship.*

In 1908, a memorial was placed, on "Constitution Hill" in Lanesborough, to Captain Jonathan Smith.**

At the dedication of this memorial, Hon. Herbert Parker delivered an address. Chief Justice Isaac Parker, who watched the convention from the gallery as a young man, in an address to the

* See MASS. LAW QUART., May, 1918, 332, Feb., 1922, end.

** See also Fiske "Critical Period of American History", 324-6.

Suffolk Grand Jury shortly after the death of Theophilus Parsons in 1813, said, "I heard there the captivating eloquence of Ames, the polished erudition of King, the ardent and pathetic appeals of Dana, the sagacious and conciliating remarks of Strong, and the arguments of other eminent men of that body; but Parsons appeared to me the master-spirit of that assembly."

This expression of our indebtedness to Parsons is in all probability a just one. But the result was not the work of any one man, and when we consider the fact that all the men mentioned by Chief Justice Parker were lawyers and that the judgment and votes which were needed to support the constitution in the convention had to come from farmers and others who were not lawyers, and when we try to transport ourselves to 1780 and picture the story of that convention and the way in which the judgment of a sufficient number of doubters was gradually and patiently convinced to an ultimate margin of nineteen votes in favor of ratification, Mr. Parker's enthusiastic tribute to Jonathan Smith's part in that great debate is largely justified.

Smith's speech was made on Friday, January 25, 1788, a few days before John Hancock recovered from his gout sufficiently to take his seat as president of the convention and submit the compromise proposal of ratification accompanied by suggested amendments to be submitted to the first congress (generally understood to have been drawn by Parsons).

It was this plan which finally succeeded in securing the vote of ratification and which called forth the statement from Thomas Jefferson (quoted in the July number of this magazine, p. 29) that, "The conduct of Massachusetts has been noble." While it was this compromise proposal that clinched the matter, yet, it is probably true that the real climax of the debate on the constitution, which lasted about a month and prepared the minds of the convention to accept the plan offered by Hancock, was reached in the speech of Jonathan Smith on January 25.

In Mr. Parker's address, he said:

> "The records of the Convention show that he took little active part in the debate, save in his one memorable and most remarkable speech, but that alone demonstrates that he must have, with extraordinary sagacity understood and appreciated the temper, the opinion, and the prejudices of his associates. We can see the sturdy, self-reliant countryman waiting for the opportune moment to bring what proved to be the decisive argument of the Convention to its deliberations.

"The ponderous and absured metaphor of the mighty whale laboriously introduced into the Convention by the hysterical oratory of the Honorable Mr. Singleterry of Sutton, afforded the requisite opportunity by contrast with the plain, direct speech of a plain and earnest man, who proceeded at once to recall the delegates from the imaginary terrors of the marine monster to the conditions actually existing on the soil of Massachusetts. . . . Then followed that speech . . . now recognized as the decisive feature in the proceedings of the Convention. I adjure you to read again that incomparable argument . . . in vigor and simplicity of speech unsurpassed in English literature; in political philosophy worthy of association with the classic essays of Hamilton, Madison, and Jay. . . .

"New York waited upon Massachusetts, Madison had written to Washington from there on the 20th of January,—'The decision of Massachusetts either way will involve the result of this state.' Again he writes on January 25th, 'The information from Boston by the mail on the evening before last, has not removed our suspense.' Washington himself writes from Virginia on the 31st day of January to Benjamin Lincoln,—'There is no doubt but the decision of the other states will have great influence here, particularly of one so respectable as Massachusetts.' Again he writes to Knox, 'Under the circumstances enumerated in your letters, the favorable decision which has taken place in that state (Massachusetts) could hardly have been expected. Nothing less than the good sense, sound reasoning, moderation and temper of the supporters of the measure could have carried the question. It will be very influential in the equivocal states.' That scene which held the anxious and absorbed attention of Washington and Hamilton was the theatre of no ordinary events.

"The fate of a nation hung upon the wisdom, prudence, moderation and good sense of the men of Massachusetts. . . .

"Jonathan Smith, speaking always with the compelling voice of stern experience, with inexorable logic, convinced his associates that liberty could exist only in obedience to law. Himself the living spirit incarnate of American self-reliance, and of American self-restraint he stands pre-eminent in this crucial incident of our national life."

The speech is so "up to date" to-day that it is here reprinted in full.

Few of us realize as we walk down Federal St. that the great debate took place in the meeting-house in "Long Lane" where the new Chamber of Commerce Building now stands, and that "Long Lane" was changed to Federal St. as soon as the convention was over.

F. W. G.

THE SPEECH OF JONATHAN SMITH.

"Mr. PRESIDENT: I am a plain man and get my living by the plough. I am not used to speak in public, but I beg your leave to say a few words to my brother plough-joggers in this house. I have lived in a part of the country where I have known the worth of good government by the want of it. There was a black cloud that rose in the east last winter, and spread over the west. (Here Mr. Wedgery interrupted: Mr. President, I wish to know what the gentleman means by the east?) I mean, Sir, the county of Bristol. The cloud rose there, and burst upon us, and produced a dreadful effect. It brought on a state of anarchy, and that leads to tyranny. I say, it brought anarchy. People that used to live peaceably, and were before good neighbors, got distracted, and took up arms against government. (Here Mr. Kinsley called to order, and asked, what had the history of last winter to do with the Constitution? Several gentleman, and among the rest, the Hon. [Samuel] Adams, said the gentleman was in order, let him go on in his own way.) I am agoing, Mr. President, to show you, my brother farmers, what were the effects of anarchy, that you may see the reasons why I wish for good government. People, I say, took up arms, and then, if you went to speak to them, you had the musket of death presented to your breast. They would rob you of your property, threaten to burn your houses; oblige you to be on your guard night and day; alarms spread from town to town; families were broke up; the tender mother would cry; O, my son is among them! What shall I do for my child! Some were taken captive, children taken out of their schools and carried away. Then we should hear of an action, and the poor prisoners were set in the front, to be killed by their own friends. How dreadful, how distressing was this! Our distress was so great that we should have been glad to snatch at any thing that looked like a government, for protection. Had any person, that was able to protect us, come and set up his standard, we should all have flocked to it, even if it had been a *monarch*, and that monarch might have proved a tyrant; so that you see that anarchy leads to tyranny; it is better to have *one* tyrnat than so many at once.

"Now, Mr. President, when I saw this Constitution, I found that it was a cure for these disorders. It was just such a thing as we wanted. I got a copy of it and read it over and over. I had

been a member of the Convention to form our own State Constitution, and had learnt something of the checks and balances of power, and I found them all here. I did not go to any lawyer, to ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion, and was pleased with this Constitution. My honorable old daddy there (pointing to Mr. Singletary) won't think that I expect to be a Congressman, and swallow up the liberties of the people. I never had any post, nor do I want one, and before I am done you will think that I don't deserve one. But I don't think the worse of the Constitution because lawyers, and men of learning, and moneyed men, are fond of it. I don't suspect that they want to get into Congress and abuse their power. I am not of such a jealous make. They that are honest men themselves are not apt to suspect other people. I don't know why our constituents have not as good a right to be jealous of us, as we seem to be of the Congress, and I think those gentlemen who are so very suspicious that as soon as a man gets into power he turns rogue, had better look at home.

"We are by this Constitution allowed to send ten members to Congress. Have we not more than that number fit to go? I dare say, if we pick out ten, we shall have another ten left, and I hope ten times ten—and will not these be a check upon those that go? Will they go to Congress and abuse their power, and do mischief, when they know that they must return and look the other ten in the face, and be called to account for their conduct? Some gentlemen think that our liberty and property are not safe in the hands of moneyed men, and men of learning. I am not of that mind.

"Brother farmers, let us suppose a case now: Suppose you had a farm of fifty acres, and your title was disputed, and there was a farm of five thousand acres joined to you, that belonged to a man of learning, and his title was involved in the same difficulty; would not you be glad to have him for your friend, rather than to stand alone in the dispute? Well, the case is the same; these lawyers, these moneyed men, these men of learning, are all embarked in the same cause with us, and we must all swim or sink together; and shall we throw the Constitution overboard because it does not please us alike. Suppose two or three of you had been at the pains to break up a piece of rough land, and sow it with wheat; would you let it lie waste, because you could not agree what sort of a fence to make? Would it not be better to put up a fence that did not please every one's fancy, rather than not fence it at all, or keep

disputing about it, until the wild beasts came in and devoured it. Some gentlemen say—don't be in a hurry, take time to consider, and don't take a leap in the dark. I say—take things in time, gather fruit when it is ripe. There is a time to sow, and a time to reap. We sowed our seed when we sent men to the Federal Convention; now is the harvest, now is the time to reap the fruit of our labor, and if we don't do it now, I am afraid we never shall have another opportunity."

JUDGE BRUCE'S BOOK ON "THE AMERICAN JUDGE"

The May number of the QUARTERLY for 1923 contained a discussion growing out of Judge Cardozo's thoughtful book, "The Nature of the Judicial Process". Now this breezy little book has come from Hon. Andrew A. Bruce, formerly Chief Justice of the Supreme Court of North Dakota and now professor of law in Northwestern University in Chicago. Any one who has heard Judge Bruce speak will find it characteristically free and vigorous in expression. It is one of the most important contributions by a trained, vigorous, and experienced mind to the current discussions in regard to the public feeling about the administration of justice and the relative position of courts in our scheme of government, at present and in future. Judge Bruce, from experience on the bench and otherwise in what is regarded as the most "radical" section of the country, has a background which makes this book especially worth reading for the bar of New England and other eastern states.

The titles of the ten chapters are as follows: "Are the Courts Oligarchic or Democratic?"—"The Courts, the Constitutions and the Regulation of Industry"—"The Need of Clarifying the Law"—"Are the Courts Responsible for Lawlessness?"—"The Cost of Litigation—The Contingent Fee"—"The Elective and Life-Term Judiciary"—"The Courts and the Legal Profession"—"The Misinformed Enthusiast and the Courts"—"More Needed Reforms"—"The Reign of Law".

In one respect, his vigor and directness, however, have led him into a serious exaggeration of the judicial function which deserves comment. It is the same tendency among modern judges which was discussed in connection with Judge Cardozo's book in the article above referred to under the title, "The Functioning of the Judicial Intellect". In his introductory chapter, Judge Bruce says, "As a matter of last resort, we are governed by our judges

and not by our legislators. . . . It is our judges who formulate our public policies and our basic law," (pp. 7-8). At the beginning of his second chapter, he says, "It has often been charged that we have a judicial oligarchy and our judges legislate. These charges should be candidly admitted" and, on p. 14, "Law always has been, and always will be, judge-made, rather than legislature-made".

While he explains these statements, I submit that, even as explained, they are serious distortions of the facts. As pointed out in the article on Judge Cardozo's book, some of our judges to-day in their efforts to be frank are "admitting" more than there is to admit. While they are "trampling" upon the old "law finding fiction", they seem to forget the fact that they, themselves, are developing a new fiction by excessive emphasis on the law making aspect of the judicial function, an emphasis which is not justified by the simple facts. Much of this judicial habit of enthusiastically admitting things about the judicial process seems to date from the "epigram" of Mr. Justice Holmes in his opinion in *So. Pacific Co.* v. *Jenson,* 244 U. S. 221 when he said:

> "I recognize without hesitation that judges must and do legislate, but they do so interstitially; they are confined from molar to molecular motions."

I respectfully submit that it is a misuse of words to say our courts "legislate". That it is a convenient catch phrase which has got itself into common use through the term "judicial legislation" is true, but that does not make it an accurate description of the part taken by the courts in "the making of law" either by decisions as to the common law or by interpretations of constitutions and statutes. It is not only inaccurate, but it is a positively misleading statement which, if persisted in, is liable to cause much more misunderstanding of the courts than the old "fiction" about "finding" law.

The word "legislate" describes, in American constitutional theory and practice, a particular function by a particular body which contributes to the "making of law". The courts perform another function. The difference in these functions is the same to-day as it was when American constitutions were framed. Nothing is gained and no idea of any kind is clarified by applying or "admitting" the word "legislate" as describing the contributions of the courts to the "making of law". The use of the word leads to confusion of thought as well as to public misunderstanding. The simple fact is that the community speaks through various instru-

ments in the process of making its own law. It speaks through the legislature, through the courts, and through the bar, including in the term "bar" the practising lawyers, text-writers, and the law school faculties. Often, also, it speaks to some extent through laymen in the form of business practice and otherwise, as it did when Lord Mansfield and others fitted the Law Merchant into the body of law applied by the courts.

The intellectual pioneer work, while it has often been done by judges, has quite as often been done by counsel or by law writers,—in other words, *by the suggestive minds in the profession.* This is one of the reasons why cases are argued by counsel before they are decided. This suggestion was more fully developed by illustration in the article already referred to. If our legal institutions are to be explained clearly to people who do not understand them and if the profession is to think clearly about itself, whether on the bench or at the bar, the function of the bar as a great law-making instrument must never be forgotten and the fact that the making of law is a gradual process resulting from a combination of broadly representative intellectual and moral forces should be emphasized. It is a mistake to talk as if our courts were more important than our legislatures or our executives. They are *as* important because they are necessary co-ordinate branches of the American scheme of government. This is a sufficiently dignified position for any court when it is placed in proper perspective without indulging in the fulsome language in which some orators in after dinner speeches or other public addresses are apt to flatter the courts.

The idea has never been expressed better than by Judge Holmes, himself, in a passage, quoted in the earlier discussion but worth requoting here, in his response to the memorial of the Middlesex County Bar on the death of Hon. Daniel S. Richardson in 1890. Judge Holmes said:

> "As we go down the long line,—at every step, as on the Appian Way, a tomb,—we can see the little space within which Mason rose, grew mighty, and was no more—or Dexter, or Choate, or Bartlett, or Lord, or Sweetser; alas! now we must add, or Richardson—and the record which remains of them is but the names of counsel attached to a few cases.
>
> "Is that the only record? I think not. Their true monument is the body of our jurisprudence—that vast cenotaph shaped by the genius of our race and by powers greater than the greatest individual, yet to which the least may make their contribution and inscribe it with their names. The glory of lawyers, like that of men of science, is more cor-

> porate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society. When I hear that one of the builders has ceased his toil, I do not ask what statue he has placed upon some conspicuous pedestal, but I think of the mighty whole and say to myself, he has done his part to help. . . . I say to myself to-day that all this wonder is the work of such patient, accurate, keen, just, and fearless spirits as Daniel Richardson."
>
> (Cf. John C. Gray's "Nature and Sources of Law," § 597a.)

In saying all this, I do not mean to suggest that Judge Bruce in his book flatters the courts—far from it. Except in the occasional use of sentences such as have been already quoted, he shows a particularly sane conception of the judicial office, its position, and functions in America.

I think he is wrong in the view which he expresses elsewhere that some plan for the decision of constitutional questions by more than a majority of the court is desirable, but that has already been discussed at length in earlier numbers of this magazine (see Jan. 1924, p. 49; May 1923, 70; Aug. 1923, 63).

When he comes to his chapter on the subject of an elective judiciary, the picture which he paints of the practical side of the elective system reminds us of what Dean Pound said to a committee of the Massachusetts legislature several years ago. He said, "The people of Massachusetts do not know what an elective judiciary means. They ought to go down on their knees and thank God every day that they have not got one." The picture painted by Judge Bruce of conditions under the elective system re-enforces this statement with emphasis.

Again, in the chapter entitled, "The Misinformed Enthusiast and the Courts," he says:

> "A treaty is merely a contract, and international law is a charter or constitution among nations, and there is no difference between violating a treaty and violating a constitution or the mandates of the established law. We fought in Europe for the supremacy of international law. We fought for a government of law among nations, and not a government of the heaviest battalions; and it matters little whether these battalions are armed men or temporary political majorities. We must fight for the same thing in America, and we must not let the mass rush of political levies abolish free government among us. If our courts yield to the pressure; if they are always thinking of the hustings; if the fear of the primary election is ever before them; if

lawyers are allowed to threaten that, if they are defeated, they will air the matter in the public press and at the polls; if candidates for judicial offices are permitted to go before political conventions and to promise that, if they are nominated and elected, they will sustain as constitutional all of the measures of which the conventions may approve; if judicial campaigns are based upon the proposition that certain candidates must be elected in order that a political program may be carried out and sustained,—then and at that moment free government and a government by law will have vanished from America" (pp. 166-167).

In a footnote following this passage, Judge Bruce says:

> "All this has been done recently in North Dakota and has been justified under the theory that a judge, like a member of Congress, is the representative of the temporary majority rather than the impartial enforcer of an established law."

Whether or not we agree with all the views expressed in the book, it is one of the most vigorous discussions of the American judiciary which has appeared and Judge Bruce has done a marked public service in writing it. F. W. G.

MORE ABOUT ELECTION BY A DEFENDANT BETWEEN A JURY TRIAL AND A TRIAL BY THE COURT IN CRIMINAL CASES.

Since the publication of the discussions relating to this subject in the QUARTERLY for August, 1923, and May, 1924, in which reference was made to the long-established practice of such election in Maryland, the suggestion has been received in support of the practice of election that,

"The latitude allowed to newspapers in working up sensations out of important crimes needs to be counterbalanced by latitude of choice allowed to the accused to avoid trial by the clamor thus raised—which in many cases is inevitable if trial is had by a jury of the vicinage. In England, the papers are restricted to colorless discussion. Our newspapers are allowed to spoil juries by sensational treatment of cases in advance and for this reason justice requires that a defendant should have his choice in order to avoid the effects of sensational publicity. It is said that this is one of the reasons why defendants in Maryland sometimes choose a trial by the court without a jury."

The following passage from Judge Bruce's recent book on "The American Judge" adds emphasis to this aspect of the matter:

"We first try our criminal cases in the magazines and in the newspapers and then complain of the time that is consumed in attempting to obtain unprejudiced jurors." (Bruce "The American Judge," 89.) F. W. G.

THE FORGOTTEN PROFESSIONAL SERVICE OF THE AUTHOR OF "TOM JONES"—ENGLISH JUSTICES OF THE PEACE IN THE 18TH CENTURY AND THE INFLUENCE OF THE FIELDING BROTHERS.

"Rural England, which was then three-fourths of England, was governed by the absolute patriarchal sway of the Justices of the Peace. Of county self-government there was none, till the establishment of County Councils in 1888. Of parish self-government there was little left, except in the organization of the partially communist agriculture of the 'open field' system.

"The Justices of the Peace absorbed more and more judicial and administrative functions, thrust upon them by a Parliament composed of country gentlemen like themselves—justices gone up to the national Quarter Sessions at Westminster. Indeed, the magistrates in the eighteenth century were hardly in any way controlled or inspected by the central authorities. Though nominees of the Crown, they in fact co-opted each other, for the Government accepted the recommendations of the Lord-Lieutenant, a local magnate primarily anxious to stand well with the squires of the county.

"The office of Justice of the Peace had been established in Plantagenet times as a working compromise between the powers claimed by the Crown and the influence exercised by local landowners. Later on, the Tudor and Stuart monarchs had, for a period of two hundred years, tried to make these unpaid local magistrates subserve the purposes of a bureaucracy devoted to the partisan projects of the Crown. But this long experiment had broken down in the final crash of 1688. Thenceforward the Justices of the Peace may be said rather to have controlled the Central Government through the Houses of Parliament than to have been themselves under any supervision. Nominally State officials, they really represented feudal power tempered by civilization and public spirit.

"They were in fact responsible to no one, though they were subject to the bitter criticism of Fielding, Smollett and other writers. And their powers and functions covered all sides of county life. They administered justice in Quarter or Petty Sessions, or in the private house of a single magistrate. They kept up the prisons and

the bridges. They licensed the publichouses. They administered the Poor Law. They levied a county rate. These and a hundred other aspects of county business lay in their absolute control. But they had not, for the multifarious purposes of justice and administration, any proper staff in their pay. Prisons and workhouses, like everything else, were farmed out to contractors, with results disastrous to efficiency and humanity.

"In Westminster and Middlesex—that is to say, in the greater London outside the jurisdiction of the City Magistrates—the amateur services of unpaid justices were inadequate to cope with so large and turbulent a population. The traditions of a more professional magistracy were started by the Fielding brothers in their office at Bow Street. (*Note*: Henry Fielding, the author of *Tom Jones,* was equally known in his own day as Justice of the Peace for Westminster. The beginnings of an effective public service that he founded in that capacity were carried on, after his death in 1754, by his half-brother, the blind Sir John Fielding, who died in 1780.) This led to the institution of Stipendiary Magistrates for Middlesex, at first out of secret service money, and in 1792 by Act of Parliament. But everywhere else, in town and country, the justices were unpaid.

"At the time George III came to the throne, the justices who did most of the work in rural districts were substantial squires, too rich to be corrupt or mean, too proud to truckle to Government, anxious to stand well with their neighbors, but filled with all the prejudices as well as the merits of their class—fierce to the point of cruelty against poachers, and armed with such a combination of powers that the occasional tyrant among them became an irremovable curse to the countryside. On the whole, they rendered England great service. Nevertheless, it was a misfortune that when the Industrial Revolution began to set classes in bitter opposition to one another, justice, administration and influence were entirely in the hands of one of the interested parties.

"A characteristic feature of the eighteenth century was the number and prominence of clergy on the magisterial bench. Some of the most active, law-learned and beneficient of the justices were clergymen, and it was only after the close of the century that the violent partisanship of the Church against the new Radicalism brought the 'parson magistrate' into popular odium in the days of Peterloo."

("British History in the Nineteenth Century 1782-1901,"—G. M. Trevelyan, pp. 22-24.)

MORE ABOUT THE SO-CALLED CHILD LABOR AMENDMENT.

In our last issue we reprinted an editorial from the Springfield Union in opposition to the so-called "Child Labor Amendment". In order to give both sides we now print an answer, to that and other discussions, from the Springfield Republican of August 5th, under the title

Child Labor Amendment and Some Misconceptions.

(By Ethel M. Johnson, *Assistant Commissioner of Labor, Massachusetts Department of Labor and Industries.)*

A series of articles opposing the federal child labor amendment is appearing in some of the Massachusetts periodicals. As there is a good deal of misconception regarding this amendment, and as the articles in question would seem to increase this misconception, it may be well to consider some of the objections presented.

In one of the articles the statement is made that the amendment is "an anti-work, compulsory school proposition for all persons under 18 years of age." This, however, is not the case. In the first place the amendment relates to labor, which is not identical with work; but is much more restricted in its application. The term "labor" is usually interpreted as applying to gainful employment outside the home. It does not cover, for instance, the daily tasks of children in connection with the household or the farm. It is broader in scope, however, than "employment," as employment is defined in the statutes of some of the states in such a way as to exclude agricultural labor and domestic service.

The term was presumably selected for these reasons: It is broad enough to permit Congress, if it desires, to enact legislation restricting the commercialized labor of children in agriculture and domestic service. It is not broad enough, however, to authorize work of children around their homes.

Does Not Deal With Education.

In the second place the amendment does not deal with school attendance or education. Neither are mentioned or implied. The amendment provides that "Congress shall have power to limit, regulate and prohibit the labor of persons under 18 years of age."

Objection is raised to the use of the phrase "persons under 18" instead of "child." This phrase was selected because the word "child" does not have the same meaning in all sections of the country and in all connections. The census report on "Gainful Occupations For Children" in 1920 uses the word "children" without

modification for minors 10 to 15 years of age. The legal definition of "child" incorporated in the labor laws of this state is "a person under 18." As it happens, that is almost the exact language chosen for the federal amendment.

It should be remembered than an amendment to the Constitution must be broad enough to permit the enactment of necessary laws; for the subsequent legislation is definitely restricted by the limits fixed in the amendment. The legislation enacted in this instance may, and probably will be, much narrower than the amendmen. It cannot be broader.

It should also be remembered that the amendment of itself does not regulate, limit or prohibit child labor. It is simply an enabling act, permitting Congress to enact, within the definite scope of the amendment, such Legislation for the protection of minors as a majority of the representatives from the 48 states consider advisable.

The amendment confers specifically upon Congress the authority it was assumed Congress had when the federal child labor laws were enacted. The states already have this power, and exercise it to varying extent. The statements that "the states have not attempted to limit, regulate or prohibit the labor or employment of persons up to the age of 18 years," and that "no state, and we include our own, would, by its statutes, assume such a power over the occupations and lives of persons between 16 and 18," are incorrect.

Massachusetts Regulation Up to 21.

Massachusetts, for instance, limits, regulates, and in some instances, prohibits, the employment of minors up to the age of 21. The labor of minors 16 to 18 years of age is carefully regulated in this state by a number of statutes. Minors between these ages may not be employed or permitted to work at certain occupations or processes: (1) In or about blast furnaces; (2) in the operation or management of hoisting machines; (3) in oiling or cleaning hazardous machinery in motion; (4) in the operation or use of any polishing or buffing wheel; (5) at switch tending; (6) at gate tending; (7) at track repairing; (8) as a brakeman, fireman, engineer, motorman or conductor upon a railroad or railway; (9) as a fireman or engineer upon any boat or vessel; (10) in operating motor vehicles of any description; (11) in or about establishments wherein gunpowder, nitroglycerine, dynamite or other high or dangerous explosive is manufactured or compounded; (12) in the manufacture of white or yellow phosphorous or phosphous matches; (13) in any distillery, brewery, or any other establishment where malt or alcoholic liquors are manufactured, packed, wrapped or bottled; (14) in that part of any hotel, theatre, concert hall, place of amusement or other establishment where intoxicating liquors are sold.

Their hours of labor in industry are definitely limited. The 48-hour law applies specifically to women and minors under 18 years. In most of the occupations in which such minors may be employed

night work is forbidden them. They may not work before certain hours in the morning or after certain hours at night. The number of hours they may work in a day and the number of days they may work in a week are specified. The conditions of their employment are regulated by the requirement for certification.

These laws have been in effect in Massachusetts for a number of years. They are enforced with co-operation of the courts, which impose the legal penalty in cases where violations have been proved.

Massachusetts has higher standards for the protection of children in industry than many of the states—higher standards, presumably, than would be embodied in federal legislation; since the amendment confers no power on Congress to regulate the labor of minors 18 and over, while Massachusetts regulates the employment of minors up to 21.

Would Relieve the State.

The passage of a federal child labor law approaching the standards now in effect in Massachusetts would relieve this state from a certain type of competition. This competition is not primarily with the labor of minors under 14. The most serious competition is presented by the labor of minors under 18 in states that do not regulate and restrict the employment of such minors as carefully as Massachusetts does.

One of the articles in the series in question cites the federal report on "Children in Gainful Occupations" at the 14th census, 1920, to suggest that there is little competition between the cotton mills of the North and South, based on child labor. The statement is made that "it appears from the census returns that out of the 1,060,000 children engaged in gainful occupations and out of the 413,000 engaged in non-agricultural pursuits, and out of the 49,000 whose labor could be of any possible detriment, there were but 62 cotton-mill operatives under 14 years of age in the whole country."

The numbers 1,060,000 and 413,000, refer to children 10 to 15 years of age. The 49,000, however, refers to children 10 to 13 years of age gainfully employed in non-agricultural pursuits. Of the 413,000 children 10 to 15 years of age, 21,000 are cotton-mill operatives. Seven thousand of these are in Massachusetts mills and 8,000 in the mills in the principal competing southern states, North Carolina, South Carolina and Georgia. Of the cotton-mill operatives 10 to 17 years of age, 16,000 are employed in Massachusetts mills, according to the census of 1920, and 25,000 in the cotton mills in the three southern states mentioned.

Limited to 48-Hour Week.

In Massachusetts all of these minors are limited to a 48-hour week. They are not permitted to work before 6.30 in the morning or after 6 o'clock at night. Those under 16 years of age are re-

stricted to an eight-hour day, and those under 18 to a nine-hour day. The children under 16 in the southern mills in question have less protection than the children under 18 in the northern mills. They may legally work from 55 to 60 hours a week and from 10 to 11 hours a day. In all of these states they are less adequately protected against night work than they are in Massachusetts.

The statement that there are only "49,000 children whose labor could be of any possible detriment" and the similar statement that "it appears from the census returns that there are only 49,000 children in the whole country whose employment by reason of age is presumably for any reason a matter of grave concern" do not appear in the census report, but represent the personal viewpoint of the writer, who assumes that only children 10 to 13 years of age need be considered, and of these children, only those engaged in non-agricultural pursuits. The entire number of children 10 to 13 years of age engaged in gainful occupations in 1920, according to the census figures, is 378,000.

The census defines the term "gainful occupation" when applied to children as including "all occupations of all child workers except those working at home, merely on general household work, on chores, or at odd times on other work." Of this number, 329,000 are recorded as engaged in agricultural occupations.

Exploitation in Agriculture.

According to investigation made by the federal children's bureau and the national child labor committee, some of the most serious cases of exploitation of young children occur in agriculture.

Many people believe that commercialized labor of children under 14 years of age in any occupation should be prohibited. Although most of the states have some prohibition upon such employment, the provisions vary widely both as to scope and as to protection afforded. The amendment would make possible uniform regulations in this respect for all states.

To many persons the employment of children under 16 and under 18 years of age in certain occupations and under certain conditions is a matter of grave concern. Of the million odd children 10 to 15 years of age gainfully employed, 7,000 are engaged in the extraction of minerals, almost 6,000 of these as coal mine operatives; and 185,000 are employed in manufacturing and mechanical industries, including the building trades and the steel industry. Over 54,000 children 10 to 16 years of age are employed in the various branches of the textile industry.

There are 2,773,000 children 10 to 17 years of age gainfully employed. More than half this number, 1,650,000, are employed in non-agricultural pursuits, 50,000 alone in mining, and 772,000 in manufacturing and mechanical industries. The hours of labor of such minors, the conditions of their employment and the processes in which they are engaged are all matters of concern to persons

who are interested in the welfare of children. They are matters for legislative regulation in the states having the most progressive labor laws. Massachusetts regulates the hours, night work and conditions of employment for minors in certain occupations up to 21 years of age, and prohibits the employment of minors under 18 in a number of occupations. The amendment would enable Congress to pass legislation establishing uniform regulations approaching Massachusetts standards for all of the states.

HENRY L. SHATTUCK'S LETTER.

(From the Transcript, September 2, 1924.)

To the Editor of the Transcript:

There appears to be much misunderstanding as to the full meaning of the so-called Child Labor Amendment which has been proposed by Congress to the States. If the true meaning and scope of this amendment were fully understood I feel sure that many who now advocate the amendment would oppose it.

A typical misconstruction of the scope of the amendment is contained in a recent letter from Mrs. Miranda C. Robinson printed in your columns. She urges the ratification of the amendment, "so that Congress may pass a law certainly constitutional which shall give to all young persons in the country their full measure of protection from dangerous gainful labor."

Let us examine the text. The gist of the amendment is contained in the first section. There is a second section which gives the States concurrent power, but under this section any State law inconsistent with any act of Congress is null and void. There is no foundation for Mrs. Robinson's interpretation to the effect that "power now exercised by the States will not in any way be diminished". Under the Eighteenth Amendment there is a similar clause as to the concurrent power. Everyone knows that Congress immediately assumed complete power over the subject by declaring every beverage having more than one-half of one per cent of alcoholic content to be intoxicating. It is well settled that any State law to the contrary is null and void. The first section, which, as I have stated, contains the gist of the amendment, reads as follows:

> "The Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age."

Be it noted that the grant of power is not limited to gainful labor, nor is it limited to dangerous labor. It covers all labor of every person until his or her nineteenth year; whether paid or un-

paid; whether dangerous or safe and beneficial; whether in the home, on the farm or in the factory; whether full time or only occasional, seasonal or part time. Amendments were offered in Congress to limit the amendment as Mrs. Robinson indicates it should be limited to harmful labor, but all amendments were defeated.

Let it be further noted that Congress is empowered to limit, regulate or prohibit. It is clear beyond dispute, having been well settled by established canons of constitutional construction, that under the power to regulate and limit, Congress may impose conditions. For example, Congress may say to every person under eighteen (and such persons comprise about one-third of our population) "you shall not work unless your schooling meets certain Federal requirements, unless you have passed certain physical tests, and unless your home conditions comply with the rules and regulations of the Federal Bureau having charge of the matter". All this will inevitably follow because Congress cannot deny persons under eighteen the right to labor without being called upon to assume responsibility for laying out a programme as to how they shall or may spend their time. This means invasion of the home and the school.

Raymond G. Fuller, an ardent advocate of the amendment, in his book entitled "Child Labor and the Constitution" admits that mere prohibition of child labor solves nothing. "The biggest part of the task," says Mr. Fuller, "lies in the direction of better schools," and he further says, "guidance, placement and supervision" are necessary as a "health and educational enterprise not only in a protective way, but in a positive and constructive way." (Preface, page 11.) Mr. Fuller also says on page 28, "Child labor reform begins and ends in the home." He has let the cat out of the bag. They want to give Congress control of education and of the home and that is why they insisted on the defeat of all amendments restricting the power of Congress within proper limits.

Many thoughtful persons believe that the adoption of the Sterling-Towner bill would tend to Prussianize American education, but those who oppose that measure should far more strongly oppose this amendment, because it grants, and by granting, invites Congress to assume and exercise vastly greater powers.

Let those who advocate this amendment so fraught with danger to our Republic, study the government of France, that happy hunting ground of bureaucracy where almost every detail of local gov-

ernment is regulated from Paris. Let them consider the deadening effect of bureaucracy upon the independence and moral fibre of the German people. Let them study the great principles of local self-government established in our dual system of State and Federal governments. Let them ponder the words of John Fiske, the great historian who in his "Critical Period of American History" uttered this solemn warning:

> "If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self-government of the States shall have been so far lost as that of the departments of France, or even so far as that of the counties of England —on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever."

Furthermore, it is not generally known how effectively the States are dealing with the question. Every State now has some form of child labor law. The Children's Bureau reports that the trend of State legislation is at present toward the establishment of a 15 or 16 year age minimum for all gainful occupations. The number of children from 10 to 15 years of age, inclusive, engaged in some form of wage-earning occupation was cut in two between 1910 and 1920. The problem has been narrowed down to one of comparatively small proportions, and is receiving increasingly effective attention from the States. This is borne out by the testimony of Raymond G. Fuller, who says (Preface, page IX):

> "Nine out of ten persons still think of child labor in terms of bygone conditions or of conditions which represent only a fraction of its total amount today. . . The worst evils of forty, twenty, even ten, years ago have been removed or vastly abated."

Let the good work go on under State supervision, and let each State learn from the experience of the others and accept that which is good. As soon as the "home folks" are convinced of the need, local legislation and regulation will follow, and will be effective because supported by an enlightened local sentiment. In this case as in many others, not the easiest, but the hardest way is the best in the long run.

HENRY L. SHATTUCK.

Boston, Aug. 30.

RAYMOND G. FULLER'S LETTER.

(From Boston Transcript September 5, 1924.)

To the Editor of the Transcript:

In a letter published in the Transcript last evening, Mr. Henry L. Shattuck expresses the belief that the proposed Child Labor Amendment to the Federal Constitution will confer upon Congress a power which, in its exercise, "means invasion of the home and the school". I say "in its exercise" because the phrase indicates the danger which Mr. Shattuck foresees and because it conveys a point which I desire to make—namely, that the test of a governmental power is in its use.

Congress has already acted twice on the assumtion that it possessed the power to limit, regulate and prohibit the labor of young persons. It supposed that this power existed as an implied power. The Supreme Court declared otherwise. The proposed constitutional amendment grants the power definitely, but restricts its application to persons under eighteen years of age.

The two successive Federal child labor laws passed under the implied power which was supposed to exist embodied the following child labor standards and these only: Prohibition of the labor of persons under sixteen in mines and quarries; prohibition of the labor of persons under fourteen in factories, mills, workshops, and manufacturing establisments; limitation of the hours of labor of persons between fourteen and sixteen in factories, mills, workshops, and manufacturing establishments to eight a day, a six-day week, and no night work.

These Federal child labor laws were much less extensive than those in force in many of the States, though going in some provisions considerably beyond the laws of a number of the backward States. They established a minimum of national decency in the protection of childhood. They also tended to remove the unfair industrial and commercial advantage possessed by backward States over progressive States like Massachusetts.

The power granted by the proposed amendment is to be exercised by Congress, the members of which are elected by and responsible to the people. Congress is not compelled by the amendment to take any action at all. It will act if public opinion demands, and it will do, let us hope, what is demanded by public opinion, as on the two previous occasions in 1916 and 1919. It will, let us hope, establsh a minimum of national decency which no State can abrogate.

What happens as the result of the adoption of the amendment depends on the workings of representative government. As Mr. James M. Beck says, in another connection, the safeguard as well as the limit of democracy is the choice of true and tried and trustworthy representatives of the people. I am not one of those who believe that Congress is going to outrage public opinion by invading the home and the school. I doubt if it would dare to do so, even if it wished.

The State of Massachusetts, to borrow the language of the proposed amendment, exercises through its General Court the power to limit, regulate and prohibit the labor of persons under eighteen years of age. More than that—the labor of persons under twenty-one years of age! We are living today under a State government which actually does more than Congress will be able to do under the proposed amendment! And see how far Massachusetts has invaded the home and the school!

If the American people will consider the proposed amendment in its historical setting, and with reference to its natural and obvious purpose, and not be frightened by imaginary dangers, they will vote for ratification. The proposed amendment is the product of the long-growing popular conviction that child labor is a matter of national concern requiring national action. That conviction has twice been expressed in Federal legislation passed by the representatives of the people in Congress. The amendment is designed to make constitutional the thing the people have twice tried to do, and affords them an opportunity to vindicate the democracy of the Constitution. Public opinion in this matter is reflected, too, in the fact that the three leading political parties of the country are each committed to the amendment and to Federal legislation under the power thereby granted. President Coolidge, Mr. Davis and Senator La Follette have individually endorsed the amendment; it was urged in Mr. Coolidge's first message to Congress, and again in his recent speech of acceptance.

Two of Mr. Shattuck's quotations from my book on "Child Labor and the Constitution" are taken out of their context and given a meaning which they do not possess in their original place. It is largely the argument of that book that the end of child labor will be achieved, not through legislation alone, much less through negative, prohibitory legislation, but through better homes and better schools. Legislation has but a limited, though a necessary, function in child labor reform. Only a minimum use of legislative

prohibitions and compulsions is desirable, and public opinion is with us on that score.

Not an unoccupied but a well occupied childhood is the goal of child labor reform. It is also one of the methods—the method of overcoming evil with good, the method of establishing in the place of child labor the substitutes for child labor, including suitable play, suitable schooling and suitable work. All this is outside the scope of child labor legislation, though not of child labor reform.

RAYMOND G. FULLER,
Executive Secretary, Massachusetts Child Labor Committee.

BOSTON, SEPT. 3.

Note.

In the foregoing letter, Mr. Fuller says, "Congress has already acted twice on the assumption that it possessed power to limit, regulate, and prohibit the labor of young persons. It supposed that this power existed as an implied power." It seems to me that this statement may be questioned.

That Congress twice attempted to exercise this power is true. Once it tried on the "assumption" that it could be sustained as part of the taxing power and that, by imposing a tax, it could indirectly regulate such labor. In the other case, it acted on the "assumption" that it could regulate it indirectly as part of the power of Congress over interstate commerce; but, to say that Congress "supposed that this power existed as an implied power" seems a very broad statement. It is perhaps another illustration of the "giant fiction" gradually developing in regard to the implications of collective action. It is a safe guess that both Jefferson and Marshall, the two great contemporary actors in the original battle between implied national powers of Congress and reserved state powers, would have agreed that Congress had no such power as that "assumed" to exist. It is a safe guess, also, that members of Congress, instead of, in fact, supposing that this power existed as an implied power, knew it was very doubtful but believed it to be politically expedient to attempt to exercise the power on the "assumption" that it existed in order to force a decision out of the Supreme Court. Congress got its answer from the Court that it could use neither the taxing power nor the power of interstate commerce as a disguise for the indirect sucking up of powers which were not delegated to Congress, but were reserved to the states. In other words, Congress in these cases, naturally enough, because it is a common legislative practice, "passed the

buck'' to the court of applying the constitutional tests. Accordingly I think instead of stating as Mr. Fuller does in so unqualified a manner that ''Congress supposed that this power existed as an implied power,'' the inference, from the repeated attempt to exercise this power, first under the guise of interstate commerce and second under the guise of taxation, is that Congress was ''trying it on''.

In regard to the arguments that Congress will not exercise powers to be granted under the proposed amendment *to the fullest extent to which the language can be strained,* it is, perhaps, well to remember the words of Thomas Jefferson, quoted in the July number of this magazine, when he said in 1787, ''I consider all the ill as established which may be established.'' And Jeremiah Mason said, a century ago, ''experience shows that legislatures are in the constant habit of exercising their power to its utmost extent. They intentionally act up to the very verge of their authority.'' The fact that Congress tried to stretch the interstate commerce power and the taxing power to cover the labor of ''young persons'' suggests that, if this amendment is adopted, every effort will be made in and out of Congress to stretch its language to the utmost and exercise every particle of power that can be argued out of it. The legal questions of power involved will doubtless be passed on sooner or later to the Supreme Court so that, if anybody is to be criticised for limiting the meaning of the amendment, the court will get the criticism.

In saying this, I am not disparaging Congress or legislatures in general. Both Congress and the state legislatures are entitled to a great deal more credit in many ways than they get. But the facts of human nature, which result in the common practice of ''passing the buck'' stand out too clearly in our history, past and present, to be ignored. These facts were thoroughly realized by our constitution makers. One of the purposes of the first ten amendments to the Constitution of the United States which, from their history, were practically conditions of ratification, was to prevent the ''sucking up'' by Congress of prohibited powers and to protect the principle of local self-government.

If we are to adopt this amendment granting Congress power to ''limit, regulate, and prohibit the labor of persons under eighteen years of age,'' *let us not fool ourselves with the notion that any part of the power thus granted will not sooner or later be used and probably stretched to the utmost in some way or other by Congress.*

F. W. GRINNELL.

THE GROWING MENACE OF OVERCENTRALIZATION.

(Remarks of Hon. A. Piatt Andrew of Massachusetts, in the House of Representatives, on the so-called "Child Labor" Amendment.)

Mr. Chairman and gentlemen, out of the discussion of this intensely appealing problem, two very encouraging facts have emerged.

First, the figures presented have revealed tremendous improvement in the child-labor situation during recent years. The census of 1910 showed that 2,000,000 boys and girls under 16 were working in that year—or more than 18 per cent of the children of that age, but the census of 1920 showed that during the 10 succeeding years the number so engaged had been cut in half, notwithstanding the intervening increase in population. The percentage of children so employed had been reduced by more than half. Speaking in exact figures, the proportion of children under 16 engaged in work was reduced during a single decade from 18.4 per cent in 1910 to 8.5 per cent in 1920.

Second, the record of State legislation has shown that the individual States made great and rapid strides during the same period in protecting children's health, education, and working conditions. Within the decade just elapsed every one of the States has come to have written upon its statute books laws compelling school attendance, as well as laws governing employment of children in industry. Some of the States have passed from six to ten successive laws restricting child labor. With regard to child labor in mills and factories, 45 of the 48 States to-day prohibit such work for children under 14, and there is less ground for anxiety about the three States that are remiss in their factory-age standard, because they are not industrial States and have virtually no factories employing children—Utah, Wyoming, and Mississippi. Even the last-named State has a 14-year minimum for girls and a 12-year minimum for boys.

With regard to child labor in mines, 41 of the 48 States have now a 16-year age minimum for such employment, and of the seven States which lack such provisions five are not mining States, and one of the other two has a 15-year age limit and the other a 14-year age limit.

Both the census statistics and the reports of State legislation

tell the same story. The conditions are by no means what they were a decade or so ago when so much was said—and rightly said—about the "cruel slavery of little children in mines and factories."

Let me quote the words of Mr. Raymond G. Fuller, one of the ablest and best-informed students of the subject, in his work upon Child Labor and the Constitution. Mr. Fuller is an advocate of this Federal amendment, yet he speaks as follows:

> Nine out of ten persons still think of child labor in terms of by-gone conditions or of conditions that represent only a fraction of its total amount to-day. Nine out of ten think of it in terms of the spectacular horrible conditions calling for drastic methods of reform. Such thought of it does not fit the present situation. The worst evils of 40, 20, even 10 years ago have been removed or vastly abated.

The fact remains, however, that about a million children under 16 were still recorded in 1920 as engaged in gainful occupations, and this situation must give us pause and demands investigation. Let us look into the figures a little further. What we find is this: That of the million children employed in 1920 more than 647,000—or more than three-fifths of that number—were employed on farms, the bulk of them on home farms. Only 413,549 were reported as gainfully employed in non-agricultural pursuits, and the census shows that of this number the larger proportion were not engaged in mines and factories or in dangerous and unhealthy occupations, but were messengers, office boys and girls, newsboys, clerks, and employees of stores. Let it also be observed that the census figures which have been quoted include all of the boys and girls who were gainfully employed; no matter whether their work was harmful or beneficial; no matter whether it was indoors or out of doors; no matter whether or not they only worked during vacation or after school hours or on Saturdays; no matter whether they helped merely during the planting and harvesting periods or the fruit packing and canning seasons; no matter whether or not they were getting a part of their vocational education as apprentices in actual work instead of in the schools. There may be a million children under 16 who still at some time in the year perform some labor for which they are paid, but the situation is certainly not as deplorable as that statement would seem to imply.

There are doubtless still many delinquencies in legislation, many lamentable instances of lax enforcement, many conditions

still requiring remedy, but the child-labor problem of to-day is by no means what it was a decade ago. The facts just quoted show that legislation by the States and its enforcement by the States have been improving by leaps and bounds. Only last year seven State legislatures added to their existing child labor laws. The question, therefore, presents itself to us to-day in a very different aspect from that which confronted our predecessors 10 and 12 years ago, when Federal legislation for the restiction of child labor and for the protection of children was first asked for. We must not discuss the question of to-day in terms of 1900 or 1910. We must ask ourselves first whether the evils which still remain are sufficiently urgent and otherwise irremediable to justify the drastic step of a constitutional amendment. I must confess, in view of the changed conditions, that I, for one, believe it altogether doubtful whether further attempts at Federal legislation in this field are justifiable.

Mr. Chairman, as I view the question, this proposed amendment is part and parcel of a much larger problem. The fundamental problem is whether we propose to abandon altogether the method of government by States which in the past has insured adaption of law to local conditions, and made possible law enforcement in the only way which laws can be effectively enforced—through the respect and concurrence of local opinion.

This is a very large and immensely grave problem which underlies the whole structure of our Goverment and upon the decision of which may very well depend our Government's continuance. Advocates of every sort of reform are looking more and more to the Nation's Capitol to correct local abuses and to launch new adventures in philanthropy upon a national scale. Every Congressman's daily mail brings letters urging support for Federal legislation to promote one or another more or less praiseworthy purpose which is inadequately realized in certain States or sections of the country. We are urged to support new Federal laws not only for the protection of children and women in industry and the restriction of the hours and wages of labor but also for the advancement and control of education; for assistance to mothers in childbirth; for the correction of inadequate divorce laws; for the suppression of gambling, prize fights, and lynching; for the encouragement of physical training; for the censorship of the press, moving pictures, advertisements, and general literature; for the control of hunting and fishing—in fact, for the regulation of everything in our lives and business except our inmost thoughts.

Our daily conduct from the cradle to the grave is thus being surrounded with restrictions emanating from the National Government, administered by Washington bureaus, enforced, or putatively enforced, by Federal police. Instead of confining the Federal Government, as was intended by the founders, to certain functions which could not be effectively handled by the States such as control of the Army and Navy, our foreign relations, our interstate and foreign commerce, our Postal System, our coinage and our currency, we are developing a Federal administration which parallels most of the activities hitherto looked after by the States, and which attempts from Washington to regulate and police everything that we have, everything that we buy and sell, everything that we enjoy, everything that we do.

The tendency is open to serious objection from many standpoints. First of all, it involves a vast addition to the expense of Government. It makes of Goverment a two-headed monster, with two sets of laws governing the same subjects, though not always conforming with the other. It means two sets of bureaus doing the same thing with double overhead, a two-fold machinery for enforcement and twice the necessary personnel. And what is worse, the cost of every new Federal bureau once established grows by what it feeds on. People anxious for betterment of conditions in States that are remiss in one or another direction first implore their representatives in Washington to establish a Federal bureau, and to enact legislation for the entire country in order to correct these local deficiencies. Then, when the wedge has been entered, they seek to drive it further. Inevitably and annually, they demand enlarged appropriations and additional enforcement officers, because the Federal bureau feels that it needs larger scope and power, and because the national laws thus enacted to remedy local conditions can not be made operative in these localities without coercion. The case before us is a case in point. We established a Federal bureau to study the problems of children, and then came the demand for larger and larger appropriations, for extended powers, for more agencies and agents to do what the State bureaus have hitherto been doing. The cost of our Federal administration is thus continually mounting. The number of Federal officeholders is continually multiplying. During the past 50 years, the number of Federal employees has increased nearly four times as rapidly as the population, and the cost per capita of the purely civil establishment (leaving out of account the Army and Navy, interest on the public debt, the ex-

penses of the Veterans' Bureau, and the Shipping Board) is to-day nearly five times what it was 50 years ago.

In the second place, the tendency, if it continues to develop as it has in recent years, will in another generation make State legislatures and State administratives useless. They will have nothing to do except to reenact and assist in executing the laws and decrees of Washington, and when that time comes, as it surely will come unless we quickly "right about face," we might as well dissolve our State lawmaking bodies and make our States officials agents of the national administration. The country will not and can not afford to maintain superfluous State lawmakers, State bureaus, and State executives when their powers and functions have been reduced to shadows. I question whether the public realizes the growing expense entailed by the present drift toward overlapping jurisdiction. I question whether the people of the several States will be content to see their local governments completely wiped out and superseded by government imposed from beyond their borders

In the third place, I question whether many of those who now so eagerly seek Federal intervention at every turn appreciate how obnoxious the realization of their demands is likely to be, how certain it is to breed friction and dissension, how damaging to the respect for law, how menacing to the very performance of our Government. Yet if their demands are listened to, if Congress continues to legislate about matters not essentially national, but to remedy local abuses and deficiencies, if Federal bureaus send more and more of their agents and wardens and police into our factories and stores and homes, the Government in Washington is certain to become more and more the object of distrust and animosity. Different sections of our vast country will be more and more lined up against each other. Our political parties will tend more and more to divide along sectional lines. In seeking to build a more powerful central government we shall tend to weaken it by making it less respected. Mr. Chairman, by pursuing this policy we are sowing the seeds of disruption and perhaps ultimate disunion. By following European models of centralized government we are not inconceivably imperiling the very continuance of the greatest experiment in popular government which the world has ever known.

Mr. Chairman, when certain States are found lax in some field of appropriate control, it would be far wiser, instead of urging the Federal Government to multiply its laws, officials, bureaus, enforcement officers, and courts, with all that this means of enlarged and

duplicating expense and annoying interference, to concentrate effort on the correction of deficient legislation or of negligent enforcement in those particular States. If in certain parts of the country the sentiment of the people has not provided, or is not supporting, wise legislation in one field or another, it would be far better to focus effort upon those sections and persuade their people willingly to adopt such measures than to seek to impose forcibly upon them legislation framed in Washington, which they perhaps have not been educated to approve or understand and which must necessarily be put into effect by outside officials sent into those regions under orders from Washington.

This is why we are bound to withhold support from many measures with the general intention of which we may be in complete accord. This is why we are bound to question all proposals for Federal laws duplicating State activities, no matter how estimable or appealing their particular purposes may be. It is on such grounds that many of us voted against the maternity bill and are reluctant to favor Federal bills looking toward control of the public schools, the press, moving pictures, physical education, hours of labor, marriage, divorce, lynching, hunting, and scores of other matters. Such proposals often have a noble purpose and a strong emotional urge, as in the matter of child labor, which is before us to-day; but here, as in most of the other cases, in my judgment, legislation and its enforcement can be left more wisely, as the founders of our Federal Government intended that they should be left, to the governments of the several States.

The time has arrived when we must call a halt upon an usurping Federal Capital. We must stop right here and now, if we are not going to abandon altogether the spirit of freedom, the tradition of home rule, and the essential principle of government by the consent of the governed, which are our richest heritage.

"THE PRICE OF INTERNATIONAL LAW" AND "THE PROBLEM OF THE INTERNATIONAL COURT TO-DAY".

(Extracts from two articles by Edward A. Harriman.)

In the May number, we printed an address by Professor Manley O. Hudson in regard to the Permanent Court of International Justice, together with the report of the Committee of the New York City Bar Association. In two articles by Edward A. Harriman, Esq. of Washington, D. C., one in the *Virginia Law Review* for May under the title "The Price of International Law" and the other in the *Boston University Law Review* for June, 1924, under the title, "The Problem of the International Court To-day", the subject has been discussed from a different point of view. As each article closes with a summary, these summaries are here reprinted for the information of the bar.

Extract from "The Price of International Law".

(Virginia Law Rev. May, 1924.)

"To sum up therefore, the writer submits the following propositions:

1. The term 'international law' is used in two senses; in the first sense international law is that part of the law of each jurisdiction which relates to international affairs. In the second sense, of a law controlling the actions of independent sovereigns, what is called law is not law, but merely international comity or morality.

2. There is a League of Nations, but there is no such thing as 'The Society of Nations'.

3. Law is the product of government. Without an international government, there can be no international law.

4. The price of international law is the surrender to an international government of the war-making power. So long as one nation 'has a right' to make war upon another, there is no real international law.

5. The League of Nations is a true, though rudimentary, society of nations, having the theoretical right to exercise, to some extent and in some manner, legislative executive, and judicial powers with reference to its members. The law of the League of Nations, therefore, is true law with reference to the members of the League, however vaguely such law may be expressed, or however imperfectly it may be enforced.

6. The law of the League of Nations is not law with reference to nations which are not members of the League.

7. The Permanent Court of International Justice, commonly called the World Court, being the organ of a government, is a true court, however limited its jurisdiction and its power of enforcing its judgment.

8. While the World Court is a true court with reference to members of the league, it is merely a tribunal of arbitration with reference to non-members who submit to its jurisdiction."

Extract from "The Problem of the International Court To-day".

(B. U. Law Rev. June, 1924.)

EXTRACT FROM MR. HARRIMAN'S ARTICLE.

To sum up the entire situation, therefore, it may be said:

1. The Permanent Court of International Justice is a true court, and is the judicial body of two international governments the League of Nations, created by Part I of the Treaty of Versailles, and the Organization of Labor, created by Part XIII of the same treaty.

2. Any case submitted to the Permanent Court must be decided by that court in accordance with the law of the League of Nations or of the Organization of Labor. This rule is not altered by the fact that the Permanent Court may in certain cases adopt a foreign rule of law as the law of the league governing the particular case, just as the Court of Maryland may apply a rule of Virginia law as the law of Maryland in a particular case, under the general doctrines governing the conflict of laws.

3. It is legally possible for the United States, with the consent of the League of Nations, to participate in the selection and management of the Permanent Court, but it is legally impossible for that court, however constituted, with the United States participating or not, to administer any other law than that of the League of Nations or the Organization of Labor, including, as above stated, such foreign rules of law as the league or the organization may adopt for the decision of particular cases.

4. Any international dispute which the United States wishes to submit to the decision of a third party, may be submitted either to a tribunal of arbitration, or to a court upon which the parties agree. The United States and England can agree to submit a dispute between them to an English court, or to an American court, or to a French court, or to the Permanent Court of International Justice, which is the Court of the League of Nations.

5. In case of a submission to arbitration, the parties to the arbitration may agree in the submission as to the rule of law which shall govern the arbitrators. If the matter is submitted to a court, the court must apply the rule of law of its own government.

6. It is legally impossible for the Permanent Court to be independent of the League of Nations and to remain a court. Par-

ticipation by the United States in the selection and management of the court, and contribution by the United States to its expenses, will not render it independent of the league, and will not destroy its existence as a court. In order to secure a body of jurists to which international disputes shall be submitted, which shall be independent of the league, the statute of the Permanent Court must be ignored, and a new tribunal created by a treaty which shall render its members entirely independent of the League of Nations.

7. It is legally possible to retain the Permanent Court of International Justice in its present form, as the Court of the League of Nations, and to provide by treaty for another body of jurists, to be selected in a manner satisfactory to the United States and to the other contracting parties, to which international disputes may be referred. Such a body may be called a court. It will not be a true court, because it will not represent any government, or administer the law of any government. It does not follow, however, that the decisions of such a body would not be just as righteous and satisfactory as the decisions of the Permanent Court of International Justice. Only such a body can be truly independent of the League of Nations, and as the United States has definitely repudiated, for the present at least, the idea of surrendering any portion of its sovereignty to an international government, it can hardly expect, or be expected, to participate in the organization or management of the judicial department of that government, which is the Permanent Court.

8. When Professor Hudson denies that the Permanent Court is the Court of the League of Nations, he denies that it is a true court, a denial which seems not to be justified by the facts. When he states that "one might as well be opposed to any international court as to be opposed to this one," his statement requires some explanation. Opposition on the part of the United States to submission to any international government necessarily involves opposition to the submission to any department of such international government, and, therefore, involves opposition to submission to any court of the League of Nations, and to any international court in a strict legal sense, because such international court is necessarily a branch of such international government. Such opposition does not involve opposition to a tribunal of jurists instituted by international agreement for the settlement of international disputes. It is because the Permanent Court is the judicial body of the League of Nations that it is supported by all believers in the league. For the same reason participation in the present court is opposed by those who oppose the United States joining the league. Opposition to an international tribunal of jurists independent of the League is slight, but the Permanent Court of International Justice cannot appeal, in one breath, to the supporters of the league upon the ground that it is a true international court, exercising the judicial power of the league as an international government, and to the opponents of the league upon the ground that it is not a court at

all, but merely an international body of jurists wholly independent of the league, and therefore, unobjectionable.

9. There is one, and only one, practical way of satisfying the demands of those who wish the United States to participate in an international tribunal of jurists independent of the league and that is to provide by treaty with other nations for an international tribunal of jurists to which international disputes may be referred, which shall be entirely independent of the League of Nations. Such international tribunal would not be a body of an international government, and would, therefore, not be a true court, but its decisions might prove just as satisfactory as those of the Permanent Court. Only such a tribunal, apparently, will satisfy the United States. If the League of Nations prefers to keep the Permanent Court of International Justice for its own use in addition, well and good. There is no reason why the United States should ask the league to discard its court because some of its members join with the United States in another tribunal. The Permanent Court of International Justice was an integral part of the original plan for the League of Nations. There has never been any serious opposition in the United States to the league. The opposition has been entirely to the joining of the league by the United States. Such opposition has been based upon the belief that neither the welfare of the United States, nor of the world at large, which the United States has never ignored, will be promoted by the entry of the United States into the league. The logical consequence of the belief that the United States should not enter the league, is the belief that the United States should not join the judicial department of the league when it is unwilling to accept full membership in the organization. The World Court that the United States demands, is a tribunal of jurists independent of the league, but this demand does not logically involve the demand that the league should discard its own court. There is nothing to prevent the Permanent Court of International Justice sitting at the Hague to deal with disputes between members of the League of Nations, and a World Court sitting at Washington to deal with international disputes involving states which are not members of the league, or which have not signed the protocol of compulsory jurisdiction of the Permanent Court. It must be remembered that Russia, Germany and the United States are not members of the League of Nations; that threats of withdrawal from the league have been made from time to time by different members; and that the protocol for the compulsory jurisdiction of the Permanent Court has not been signed by the most important members of the league. From the mere standpoint of legal simplicity, without regard to practical consequences, it would, of course, be simpler to have the League of Nations include all the nations in the world, in which case the Permanent Court of International Justice would be the only international court required. The Permanent Court, however, is clearly inadequate for nations which are not members of the league. What

is needed, therefore, at the present time, is an international court, so-called, which shall include all nations. The need for such a court will continue until the time comes, if ever, when all nations shall be willing to unite in a world government. This new World Court, in which all nations should be invited to participate, should be initiated by the United States, and should sit in Washington. Between the two courts there would be no conflict. All members of the league signing the protocol for compulsory jurisdiction would be bound to accept the jurisdiction of the Permanent Court. All other nations would have the option of submitting their disputes either to the Permanent Court at the Hague, or to the World Court at Washington. There is no reason why a particular nation might not be a member of both courts. The legal difference between the two courts would be that the Permanent Court of International Justice is the court of the League of Nations and the Organization of Labor, administering the law of those two governments. The refusal of a litigant in that court to obey a decree of that court constitutes contempt of the court. While that court has at present no power to punish for contempt, such default by a member of the league may be subject to various sanctions under the league Covenant, and by a member of the Organization of Labor, to various sanctions under Part XIII of the treaty, one of which sanctions is a decree in the nature of limited outlawry by which other members of the league are authorized by the court to take steps against the defaulting member. In the case of a non-member of the league, while the sanctions are not so clear, there is, nevertheless, an indication of sanctions in Articles 10 and 11, and there is nothing to prevent the amendment of either Part I or Part XIII of the treaty to increase those sanctions.

The World Court at Washington, on the other hand, would not be a court of any government, and would not administer the law of any government. It would decide cases submitted to it in accordance with the rules agreed upon by the parties, and if no such rules were agreed upon, then in accordance with the views of the judges as to what is just and reasonable. Both the Court at the Hague, and the tribunal at Washington, would decide cases "in accordance with international law," but this phrase is meaningless, because there is no authority determining what constitutes international law, except that the Permanent Court is bound by all the provisions as to international law contained in the Treaty of Versailles. There is no recognized code of international law to bind either court, and the statute of the Permanent Court attempts, as far as possible, to prevent the establishment of any body of law by judicial decision in the Anglo-Saxon method. Article 59 of the statute provides "that the decision of the court has no binding force except between the parties and with respect to that particular case." This article nullifies the whole Anglo-American doctrine as to the effect of judicial precedents. The Court at Washington, not representing any government, would have no sanction for its deci-

sions. The absence of such sanction, however, is of little practical consequence. The sanctions for the decrees of the Permanent Court of International Justice are feeble and inefficient. The World Court at Washington would have no sanctions at all, but in international matters the sanctions are not as important as in private affairs. Sanctions for a decision of the Supreme Court of the United States, giving judgment against a State, are not wanting, as the case of *Virginia* v. *West Virginia*, 238 U. S. 202, shows, but those sanctions were insufficient to prevent the Civil War; whereas, in the case of *Virginia* v. *West Verginia*, they proved unnecessary. Ordinarily a nation which will submit a dispute to the decision of a third party will accept the award. In the rare cases where it may refuse to do so, the attempt to enforce that award is just as likely to lead to war as the original dispute. The great difference between the two courts will be that the Washington Court will be entirely independent of the League of Nations, an independence which is essential to satisfy those persons who will not consent that the United States shall enter the league.

The practical problem now before the advocates of a World Court is not how to secure a court which will satisfy those who believe in the League of Nations, but how to secure a court which will satisfy those who believe that the United States should keep out of that league.

In the case of the Permanent Court of International Justice, no *recherche de la paternite* is required. It is not a judicial foundling left on the world's doorstep, but the legitimate offspring of the League of Nations—a relationship of which neither parent nor child need be ashamed. The League, and the Permanent Court, which is its judicial body, make a strong appeal on their merits to many intelligent persons. It is unnecessary, therefore, for the friends of the Permanent Court to deny its ancestry, in order to attract the United States to its support. Those who want a League Court should be entirely satisfied with the Permanent Court of International Justice. Those who want a "World Court," but do not want a League Court, should offer some plan for a tribunal independent of the league, one suggestion for which has been made in this article; but no one should dream for a moment that there is any legal possibility of making the present Permanent Court of International Justice a court of any other body than the League of Nations; or that there can be in legal contemplation any such thing as a true international court which is not the judicial body of a true international government; or that there can be a true international government to which independent national sovereignty is not, to some extent, surrendered.

THE PLAN OF THE AMERICAN BAR ASSOCIATION FOR REGISTRATION OF DISBARMENTS.

The Secretary has received the following communication:

AMERICAN BAR ASSOCIATION.

ORGANIZED 1878.

BALTIMORE, MD., June 19, 1924.

Secretary Massachusetts Bar Association:

DEAR SIR:—

At a meeting of the Executive Committee of the American Bar Association held in Philadelphia on January 15th, 1924, a resolution was adopted to the effect that the use of the American Bar Association as a clearing house for the registration of disbarments in the various states, would act as a great deterrant to unscrupulous practitioners, and that, therefore, the Secretary of the Association be instructed to proceed as soon as practicable, to put into effect the following plan:

(1) The Secretary of the American Bar Association shall at stated intervals request the Secretaries of the various State Bar Associations to report to him the *final* disbarment of any member of the Bar of their respective jurisdictions, such State Bar Association secretaries obtaining the requisite information from their local and county associations as and when necessary.

(2) The Secretary of the American Bar Association shall compile the information so obtained, and at stated intervals notify the secretaries of the respective state associations of all *final* disbarments throughout the entire country, reported up to that date.

(3) The Secretaries of the respective state associations shall be requested in turn to communicate such information so received, to the various local or county associations of their respective states, to the end that, accurately and with a minimum amount of labor, every bar association within the United States shall be put in possession of the names of all lawyers who have been disbarred throughout the United States during a given period.

I trust that the above proposal will meet with the approval of your Association, the need for a plan of this nature being very definite and real. I shall, therefore, appreciate it if you will lay

the matter before your Association in the proper way, and trust that it will see fit to give you such authorization as may be necessary, so that I may have your co-operation in putting the plan into effect.

It is proposed, at the start at least, that the lists of disbarments be compiled and distributed from my office every three months, or four times a year. It is further proposed that the first list shall be distributed on October 1st, next. Accordingly, I shall appreciate it if in laying the matter before your Association, you will explain that the first list of disbarments from your state, should be forwarded to me not later than September 1st, next, in order to insure proper consideration being given to the same, along with similar data received from the other jurisdictions.

In this connection, I take the liberty of suggesting that it will be of assistance and will simplify the work, if you will make such arrangements as may be necessary to insure prompt recordation in your office of all *final* disbarments as they occur within your state. The value of the proposed service depends, of course, to a large extent, upon the frequency, as well as the regularity with which the state associations, and through them the more local bodies, are advised of disbarments. Otherwise, unfit persons may slip through for want of timely detection. I should add that the three months' interval is proposed as a desirable one to adopt at the beginning, but of course, the number of names received by my office during the next year will make it possible to determine more accurately the frequency with which information should be requested from the local associations, and then compiled and distributed.

Lastly, permit me to warn against sending in names of disbarred lawyers until such disbarments have been made *final*, since otherwise it might develop that there would be published the name of a person disbarred, and thereafter the judgment of disbarment might, through appeal, be reversed.

Hoping that the American Bar Association may have your co-operation in this matter, and assuring you that if there is any further information which you require, I shall be glad to have you so advise me, I am

Yours very truly,

WILLIAM C. COLEMAN,
Acting Secretary.

LAW SCHOOL OF HARVARD UNIVERSITY, CAMBRIDGE, MASS.

SEPTEMBER 18, 1924.

Editor Massachusetts Law Quarterly:

DEAR SIR:

I find that we lack Records and Briefs in the Supreme Judicial Court of Massachusetts from 1874 to 1904. Will you please be so kind as to call to the attention of the Massachusetts Bar the fact that we would like to have Records and Briefs in Cases in the Supreme Judicial Court of Massachusetts, beginning with volume 115 and extending through volume 185? If we can obtain these Records and Briefs, we will then have in this library the period from 1867 to date covered with substantial completeness. I am sure that there must be buried away in lawyers' offices a number of the Records and Briefs we want. If the Records can't be supplied we shall be glad to get the Briefs, and if the Briefs can't be supplied, we shall be glad to get the Records.

We shall be very grateful to you for any publicity you may be able to give this request.

Yours very sincerely,

ELDON R. JAMES,

Librarian.